

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 YAVAPAI COUNTY, ARIZONA

FOR THE COUNTY OF YAVAPAI NOV 23 AM 9:01

SANDRA K MARKHAM, CLERK

BY: _____

Jacqueline Harshman

STATE OF ARIZONA,)

Plaintiff,)

vs.)

Case No. V1300CR201080049

JAMES ARTHUR RAY,)

Defendant.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY THIRTY-NINE

APRIL 29, 2011

Camp Verde, Arizona

ORIGINAL

REPORTED BY
 MINA G. HUNT
 AZ CR NO. 50619
 CA CSR NO. 8335

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
2 FOR THE COUNTY OF YAVAPAI
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4 STATE OF ARIZONA,)
5 Plaintiff,)
6 vs.) Case No V1300CR201080049
7 JAMES ARTHUR RAY,)
8 Defendant)
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1 APPEARANCES OF COUNSEL:

2 For the Plaintiff:

3 YAVAPAI COUNTY ATTORNEY'S OFFICE
4 BY: SHEILA SULLIVAN POLK, ATTORNEY
5 BY: BILL R. HUGHES, ATTORNEY
255 East Gurley
Prescott, Arizona 86301-3868

6 For the Defendant:

7 THOMAS K. KELLY, PC
8 BY: THOMAS K. KELLY, ATTORNEY
425 East Gurley
9 Prescott, Arizona 86301-0001

10 MUNGER TOLLES & OLSON, LLP
11 BY: LUIS LI, ATTORNEY
12 BY: TRUC DO, ATTORNEY
355 South Grand Avenue
Thirti-fifth Floor
Los Angeles, California 90071-1560

13 MUNGER TOLLES & OLSON, LLP
14 BY: MIRIAM L. SEIFTER, ATTORNEY
560 Mission Street
15 San Francisco, California 94105-2907

1 Proceedings had before the Honorable
2 WARREN R. DARROW, Judge, taken on Friday, April 29,
3 2011, at Yavapai County Superior Court, Division
4 Pro Tem B, 2840 North Commonwealth Drive,
5 Camp Verde, Arizona, before Mina G. Hunt, Certified
6 Reporter within and for the State of Arizona.
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PROCEEDINGS

(Proceedings continued outside presence of jury.)

THE COURT: The record will show the presence of Mr. Ray and the attorneys.

And the Court has indicated that this would be the time to discuss some rulings or a ruling about some anticipated testimony. And specifically with regard to Detective Diskin, discussion about comparisons, but Mr. Ray's ceremonies with others, prior sweat lodge information.

I really don't think I should need to be explaining these rules at this time. I think they have been consistent. Before I get into the actual ruling to try to provide some guidance, I do want to note one thing, though.

I'm not going to have a blanket rule about bench conferences. Sometimes you need them. But I'm not likely to be granting them. Be much less frequent.

And I'll say this. If there is a motion for mistrial that the defendant believes is appropriate, obviously that needs to be raised.

And if there's a request to approach, I may or may

not allow that. But that certainly is a signal that that could be a problem. And if there's continuing questions beyond what is appropriate, that's just something that will be considered when we get to the first recess and hear the motion. We just got to reduce the bench conferences. We've been over this so many times.

In order to discuss the ruling with regard to prior sweat lodge ceremonies, comparisons, I need to go into some history. And perhaps in looking at this larger picture, it will frame things a little better.

I want to go back to the meeting with the medical examiners in December, I believe it was, of '09. And in that meeting there was a PowerPoint presented for the medical examiners to consider. The defense was not originally allowed access to that PowerPoint, which was given to the medical examiners to consider in arriving at their opinions. There was litigation for that.

Included in that PowerPoint was a statement that a prior sweat lodge ceremony participant suffered heat stroke. To my knowledge, and from the records I've seen, that was never the case. However, that's what was printed -- and I'm

sorry. That's what was presented to the medical examiners.

I would imagine that Detective Diskin, at the time that PowerPoint was presented, might have characterized his state of knowledge as just that. He knew that there was a prior sweat lodge participant who had suffered a heat stroke. And that's come up. That's -- that turned out not to be the case.

And without in any way implying intent, the word "misrepresentation" seems to be appropriate. There can be negligent misrepresentation, various misrepresentation. But that information was given to the medical examiner in that fashion. Here's what happened.

And the state has said that Dr. Lyon considered that prior information to be important. When Mr. Hughes was presenting Dr. Lyons's testimony, there was a request to present that information, the information relied on by Dr. Lyon, because he said it was relevant even though it turned out to be inaccurate.

Is that -- have I said anything that does not seem accurate so far, Mr. Hughes?

MR. HUGHES: Your Honor, only that I believe

that the records that we have for Mr. Pfankuch indicate it was heat exhaustion that he suffered from.

THE COURT: And that takes me right into my next point. Do you recall what Dr. Lyon discussed, testified to, about the difference between heat exhaustion and heat stroke? Do you recall the testimony?

MR. HUGHES: I do.

THE COURT: There's a major distinction. And again, if I -- and if I'm not recalling the testimony correctly, the distinction has to do -- in a sense, there's a talk about this continuum. But at some point it becomes a difference in degree.

I recall him saying, when you're talking about heat stroke, you're talking about a serious, life-threatening condition. Heat exhaustion, such things as feeling woozy, may -- may faint, there may be some kind of unconsciousness. But you're really talking about two different situations.

And the point here is that there is information now before this jury. Some of it has come through by the statement of Mr. Ray that was given presweat lodge about what to expect. So a

1 lot of information that could be related to heat
2 conditions is present in that fashion.

3 But the issue becomes one of just
4 blurring that distinction, just blurring that
5 distinction. And that 404(b) ruling stressed that
6 so much. And we still -- we still deal with that.

7 So I hope that frames for people a bit
8 about what -- what the problem -- the problem is
9 and how it just -- the testimony just goes beyond
10 what has really -- really been established. Or
11 potentially it can do that.

12 And it's so difficult if you don't get
13 the overall concept of -- of what can be presented
14 to set rules. And I -- no one suggested that
15 Rule 614 should just apply at this point. And it
16 would be presumptuous to -- to suggest that.

17 But -- and, Mr. Kelly, Ms. Polk, it would
18 appear to me, and I think it is appropriate for the
19 detective to be able to explain that, based on his
20 investigation -- and there's been considerable
21 testimony already about the extent of that, the
22 amount of time spent, the people he has talked to.
23 There's been enough of that that if he testifies
24 based on that investigation, he -- he was focusing
25 on heat based on what was stated by the Mercers and

1 other information, he believed there was a
2 difference in the sweat lodge ceremonies conducted
3 by Mr. Ray compared to the other sweat lodge
4 ceremonies. Something in that fashion would --
5 would be acceptable.

6 Now, anytime you -- you get that kind of
7 thing, you really have in a sense hearsay being
8 conveyed. And if there's some type of limiting
9 instruction to -- to caution about forming
10 conclusions because this is what the detective
11 concluded, that's -- that's something to be
12 considered. And I mentioned that yesterday.

13 However, testimony along those lines --
14 And, Ms. Polk, especially if with it were
15 in a leading fashion --

16 Mr. Kelly, relatively brief --
17 So that the detective can explain his
18 actions, his investigation, it's appropriate.

19 To try to get into numbers and conveying
20 what various people have said in phone interviews,
21 in phone interviews, and then conveying that
22 somehow as accurate, necessarily accurate, that's
23 where the problem really comes in.

24 And what I mentioned yesterday too about
25 redirect is important. If there is testimony to

1 that effect, and then Mr. Kelly cross-examines and
2 suggested there just wasn't much work done -- I
3 don't know. But at some point the -- elaborating
4 more on the scope or the extent, the intensity, and
5 whatever adjective you want to use regarding the
6 effort, then -- then there can be testimony to that
7 effect. I think that would be appropriate.

8 Another thing to anticipate is this: In
9 the pleading that was filed by the state, not the
10 one this morning. I brought that out. That has to
11 do with the requested near-contemporaneous curative
12 instruction. But the previous pleading, there was
13 a mention of -- and it had to do with Dr. Kent.

14 It mentioned how there has been a ruling
15 that -- that the testimony that's come in so far
16 isn't relevant to cause, something to that effect.
17 And what I've stated and what I've ruled is that
18 that's subject to what experts might -- might say.

19 And that raises another point. That
20 means that I anticipate there can be questions to
21 experts having to do with this relevant testimony,
22 as Dr. Lyon said. But it has to be in the context
23 of what's already been presented to the jury,
24 essentially, either in the form of the preswearing
25 lodge instructions or in the form of what's been in

1 the Mercers'. And it has to be presented in that
2 factual kind of form so that they can offer the
3 opinion. That has to -- has to be permitted.

4 So I want the defense to know that you
5 can be thinking about that because I can see that
6 coming up.

7 I've also mentioned before that I believe
8 that the testimony that has come in so far
9 regarding prior sweat lodge ceremonies is
10 admissible on other bases. For example, with
11 regard to the Mercers, how can anyone understand
12 what the Mercers are doing in 2009 if they can't
13 give a background to what they know about the sweat
14 lodges, how they conduct them, what they think
15 their -- their duties are or responsibilities, what
16 they've seen in other situations, how they react.
17 And they also testified at the Terrazas hearing.

18 With Jennifer Haley the testimony was far
19 more abbreviated. But once again, she was also
20 a -- had a role in the 2009. And that testimony
21 provided meaning for that. So keep that in mind,
22 as well.

23 So this really came up in the context, I
24 think --

25 Well, Ms. Polk, you were concerned. And

1 so you -- you asked for some further guidance. And
2 if that covers it, I'd like to know.

3 MS. POLK: Yes, Your Honor. That's very
4 helpful. What the detective -- I understand the
5 Court's ruling that the detective can't say that
6 based on the investigation that -- and the
7 information that he learned that there's a
8 difference between Mr. Ray's sweat lodge ceremonies
9 and those conducted by other facilitators.

10 THE COURT: Based in terms of his belief, not
11 his knowledge, not his conclusion.

12 MS. POLK: I understand that. The -- as
13 background to that, I would like the detective to
14 be able to tell the jury, then, the number of
15 interviews that he conducted, that he interviewed
16 individuals who had participated in Mr. Ray's sweat
17 lodge ceremonies in 2003, 2004, 2005, 2006, 2007,
18 and 2008, that he interviewed former employees of
19 Mr. Ray, that he interviewed the families of the
20 victims, and he interviewed people who had attended
21 other events sponsored by James Ray International
22 and followed up on various leads, to set the
23 background for what that investigation is.

24 THE COURT: There has already been testimony,
25 quite a bit, as I recall, about the number of

1 people he's interviewed, the years he's covered. I
2 think it went all the way back to 2003 was the
3 testimony. So once again, it's just emphasizing
4 that.

5 And what I would say is this, Ms. Polk:
6 It needs to be that if you spend a number of hours
7 and you talk to many people, if there's -- I don't
8 know if it can be quantified, but I'm hearing --
9 I'm hearing 15 or 20 minutes of testimony on
10 something that is -- doesn't need to have that kind
11 of attention. But --

12 MS. POLK: Your Honor, this is just two or
13 three questions. Essentially, he will say what I
14 just said -- just said, that he interviewed "X"
15 number of people, they were participants from all
16 those years that I just listed, that he also
17 interviewed people about other sweat lodge
18 ceremonies not conducted by Mr. Ray, that he
19 interviewed former employees of Mr. Ray and spoke
20 to individuals who had participated in other events
21 sponsored by Mr. Ray.

22 And then based on that -- and this is
23 going back to the guidance of the Court -- that his
24 conclusion, that his opinions, based on the results
25 of this investigation, led him to conclude that

1 there was a difference between Mr. Ray's sweat
2 lodge ceremony and ceremonies facilitated by other
3 individuals.

4 THE COURT: In terms of what people do in
5 investigations, that routinely comes in as long as
6 the hearsay doesn't come along with it.

7 MS. POLK: And then I would just add the
8 line -- and this has already come in -- that it was
9 the extreme nature of Mr. Ray's sweat lodge
10 ceremony that became the focus of his
11 investigation.

12 THE COURT: Work in progress.

13 Mr. Kelly.

14 MR. KELLY: Judge, in terms of limiting the
15 information acquired by Detective Diskin during his
16 investigation, I agree that's the limitation.
17 Where I disagree with the state is it's been asked
18 and answered and would unduly emphasize this
19 morning if she backed up and asked those questions
20 again.

21 I recall specific questions. How many
22 people did you interview? He said, 75. What --
23 you know -- what time period did that cover? He
24 said, 2003 through 2009.

25 He said that he has a belief that JRI and

1 James Ray sweat lodges were more extreme. He
2 testified that he interviewed JRI employees, and --
3 and based on that, that there's a difference of the
4 heat. And so I would object now to emphasizing
5 that. It seems improper.

6 And the other thing is -- and you've just
7 articulated this. And I've had to object
8 repeatedly. There's a difference between a belief
9 and an opinion. And we filed -- I think it's under
10 415 -- a pretrial motion precluding opinions as to
11 ultimately issues from lay witnesses.

12 So when you use words like "opinion" and
13 "conclusion," Judge, I would ask the Court to
14 instruct the State of Arizona that those words
15 should be phrased as beliefs. Because a conclusion
16 implies that somehow there's some type of
17 investigatory basis upon which the person possesses
18 specialized training, education, and experience to
19 provide an opinion, such as the cause of death is
20 due to heat.

21 And -- and that's reserved for an expert
22 witness. Detective Diskin is not an expert. So I
23 have no -- I have no problem, and I mentioned this
24 yesterday, with him saying, well, based on my
25 investigation, I believed it was heat. That's much

1 different than, I concluded it was heat.

2 THE COURT: And I -- Mr. Kelly, the other
3 thing that I added, and I -- this would be one
4 aspect of repetition, is that in that context to
5 indicate that there was a difference between
6 ceremonies, I believe that leaving it at that, it
7 provides the picture and explains why the effort
8 was expended where it was.

9 And to go into more detail, I think --

10 Again, Ms. Polk, if Mr. Kelly's
11 cross-examination really suggests that this wasn't
12 thorough somehow, then those numbers and everything
13 might well become relevant and -- and can be talked
14 about on redirect if there's that kind of
15 suggestion.

16 MR. KELLY: And, Judge, I was just addressing
17 the first issue. And I've tried to --

18 THE COURT: I want to get an understanding.
19 We really need to get through this with all further
20 witnesses and just -- and the bench conferences
21 just have to stop.

22 MR. KELLY: Judge, and I --

23 THE COURT: So let's -- let's go through the
24 first part, then, to see is there any objection to
25 having the detective say that he's done this

1 investigation.

2 And, Ms. Polk, it's already been
3 testified to about the scope of it. He's done this
4 investigation and he focused on heat. It was his
5 belief that this was heat-related.

6 Again, it's awkward for me to talk about
7 this because testimony has to be truthful,
8 obviously, and it has to be the detective's words,
9 not mine, yours, or Ms. Polk's, except to the
10 extent they properly frame true statements.

11 Do you have any issue with that so far,
12 what I've just stated?

13 MR. KELLY: No, Judge.

14 THE COURT: Okay.

15 MR. KELLY: I believe that is a proper way to
16 characterize his belief based on his investigation
17 without going into the specifics of his inquiry
18 over a six-year time period and -- and opening the
19 door to all this other stuff we've been arguing
20 about repeatedly.

21 I'd further assert, Judge, and this is --
22 I'm confused. So I realize what time it is.

23 But --

24 THE COURT: No --

25 MR. KELLY: You know, you brought out five

1 points here. And -- including Rule 614, and
2 Daniel P. And I've flipped the PowerPoint to that
3 particular reference the Court has stated. And in
4 my -- I suppose I have two big questions.

5 One is my cross-examination is solely
6 focused on what this detective did in 2009
7 and 2010, period. There isn't a question about a
8 witness who participated prior to 2009. As an
9 example, did you test the soil samples you took?

10 I cannot believe or agree that that would
11 somehow open the door by then allowing the state to
12 say, well, no. The reason I didn't test the soil
13 samples is because I spoke with somebody who said
14 Daniel P. suffered from heat stroke in 2005.

15 And I believe that's what the state is
16 asserting. And I need to know before I start --

17 THE COURT: But we're not there yet. First we
18 need to know the guidance that Ms. Polk wanted.
19 And we -- we talked about one aspect of it, which
20 you didn't indicate you didn't have an issue there.

21 The other part, though, is the detective
22 again saying -- and it came up with saying -- came
23 up yesterday when he testified about extreme. And
24 that came in. But to say the other thing was to
25 note the difference, the difference in ceremonies,

1 phrased in that type of -- that type of fashion,
2 just in that abbreviated form. I want to know if
3 what you're position is on that.

4 And then, again, I said, this is turning
5 out to be a work in progress.

6 MR. KELLY: And I guess my position is that
7 the evidence in this case -- you know -- the actual
8 factual evidence that has been admitted is what the
9 jury needs to determine in that regard.

10 As an example -- I mean -- and I don't
11 have the exhibit numbers memorized. But the tape,
12 the presweat lodge tape. My client says something
13 like, it's hot, hotter, hotter than it's ever been.

14 He says, my sweat lodges are the hottest.

15 And during an interview with Ted Mercer,
16 and he admitted on the witness stand, he said,
17 well, I don't think they're any hotter this year.

18 The jury has to decide that, not
19 Detective Diskin. That's my point.

20 THE COURT: The comparison has to do with the
21 other sweat lodges that the Mercers were part of.
22 And that gets into all these rather complex --
23 potentially complex causal issues about offgassing
24 that we see in the email report that was disclosed
25 a few weeks ago, a number of things like that. The

1 talk about volatiles are -- how encompassing a
2 volatile is. Is it just in the coverings? Is it
3 in other things. I mean -- you know -- a whole lot
4 of questions there that come up. But --

5 MR. KELLY: Judge, so you know, I anticipate
6 my cross-examination as it relates to 2009. And
7 this detective's investigation will ask those types
8 of questions.

9 THE COURT: We got to stop because we're
10 getting ahead, and we can only do one thing at a
11 time. The first thing has to do with Ms. Polk has
12 got a witness on the stand. And she's -- you
13 know -- asked for some guidance so there's not a
14 problem.

15 And I'm saying it appears to me that the
16 fashion in talking about the investigation and --
17 you know -- the time -- and the time was spent and
18 the focus was the heat and that was the conclusion.

19 And also, and what I haven't heard you
20 say, noting what the Mercers said regard -- you
21 know -- the other ceremonies, not Mr. Ray's, a
22 difference. I think that's appropriate to state
23 that.

24 MR. KELLY: Judge, here's my concern.

25 THE COURT: About part two?

1 MR. KELLY: The Mercers have testified.
2 That's the facts in this case. The jury needs to
3 interpret those facts, and the attorneys will argue
4 those facts in closing.

5 This witness isn't entitled to provide an
6 opinion as to the relevance of the Mercers'
7 testimony.

8 THE COURT: This witness -- and in many
9 context, if an investigation is being challenged, a
10 witness can explain where he or she is going.
11 You've made an example. It was -- it was an
12 extreme example. But sometimes they point up the
13 problem. You used the example of priors.

14 If there's a -- you know -- if an officer
15 said, well, I knew this person had five priors, so
16 I didn't need to look any further. So does that
17 mean that he gets to bring in that totally
18 inadmissible evidence? And I will say -- the thing
19 here is that heat -- there's an argument that heat
20 is a factor. You know, I'm trying to be as neutral
21 as possible.

22 And it's -- and that's a different
23 question that -- you know -- focusing on heat. And
24 one could say there's real logic on why there was
25 some focusing on heat given the recording, given

1 what the Mercers have said and their observations.
2 So there's a distinction there.

3 And the point is, what can be done to
4 explain an investigation and where it went,
5 Mr. Kelly? And that -- that's the difficult issue.
6 But not open in this -- in any case you've got
7 hearsay through the officer about this is what
8 people told me over the phone. People -- well, I
9 don't need to say what people might say over the
10 phone that they wouldn't say sitting right here.

11 MR. KELLY: And our request would be for a
12 limiting instruction because I believe that's the
13 proper procedure under the law in a situation where
14 there's -- trying to think of a word --

15 inadmissible or improper evidence that may
16 formulate the basis of an opinion that has 403
17 considerations. Then there should be some type of
18 direction through a limiting instruction to the
19 witness that he can only mention certain things.

20 And I think you've discussed it, Judge,
21 in my opinion, and that is based on six years and
22 75 witness interviews from all those years and all
23 these different capacities, I was focused on heat
24 without any specificity.

25 And, again, I still -- perhaps I

1 misunderstood you, but I don't believe he should be
2 permitted to interpret the Mercers' testimony or
3 anyone else's.

4 THE COURT: No. But it's just -- well, based
5 on the -- the other aspect of this is I -- I
6 believe there was a difference in the -- in the
7 ceremonies. That's what I'm saying.

8 MR. KELLY: I think that's come out.

9 THE COURT: It has. But I'm just saying. I
10 think it has as well. But that's what I'm saying.
11 I think that should be permitted and then move
12 ahead.

13 MR. KELLY: And I agree, Judge. And if they
14 on redirect after I cross-examine the detective
15 and -- the same rules should apply. I haven't
16 opened the door.

17 THE COURT: Okay. Well, that's part two. I
18 want to go back to Ms. Polk and see if we have an
19 understanding so we can go through the witness
20 testimony.

21 Ms. Polk.

22 MS. POLK: I believe we do, Your Honor.
23 Although, the focus -- this detective's focus was
24 on Mr. Ray's conduct, the extreme nature of his
25 event with heat being part of that extreme nature.

1 It's not just the heat but what became the focus of
2 the investigation was the extreme nature of
3 Mr. Ray's events and his conduct.

4 With regards to --

5 THE COURT: I just want to caution again. You
6 use "extreme" and that -- you know -- where does
7 that go? His belief as to the extreme nature,
8 something of that -- something that and just one
9 question on that. And that's the manner it should
10 be phrased.

11 Right then, again, Ms. Polk, you stated
12 it's inclusive. No. It's the extreme nature.
13 Well, many people might characterize it that way.
14 Ultimately that could well be a jury question. And
15 that's the concern.

16 But anyhow, go ahead.

17 MS. POLK: And I understand that, Your Honor.
18 I'm -- when I question the witness we will -- I
19 will phrase the appropriate question. I'm just
20 getting to the meat of what this witness ultimately
21 was focusing on.

22 And what he was focusing on was the
23 extreme nature -- and that was allowed yesterday to
24 say he was focusing on --

25 THE COURT: What he believed?

1 MS. POLK: Yes. And I understand the proper
2 form of the question. And that is what his
3 testimony would be, that based on the
4 investigation, it was his belief that Mr. Ray's
5 events were extreme, and heat became the focus, and
6 it's Mr. Ray's conduct.

7 But backing up, I'm -- the jury needs to
8 be able to assess the reasonableness of
9 Mr. Diskin's -- Detective Diskin's investigation,
10 the reasonableness of his decision to go in that
11 direction. And so to somehow abbreviate and not
12 let the jury know that in reaching that belief he
13 had interviewed participants from all the various
14 years --

15 THE COURT: But you've already covered that.

16 MS. POLK: I don't believe that he stated --
17 Judge, I was cut off. That was right where we
18 suddenly have objections and then I made the
19 decision at that time after one of our bench
20 conferences to leave that alone knowing that we
21 were going to -- and then we later had the
22 discussion after.

23 What he didn't tell the jury was that he
24 also interviewed people who had -- such as Fawn
25 Foster -- had had information that when it's not an

1 event run by Mr. Ray, that there's no problems.
2 And I don't believe I've been able to -- the
3 detective has been able to comment on that.

4 But with that addition, I believe I
5 understand the Court's direction.

6 THE COURT: I -- what I hear is trying to
7 suggest that talked to people, even on the inside,
8 employees. And they know, and so I really know.
9 It's really funneling in the --

10 MS. POLK: And, Your Honor, I want to go back
11 to this issue of Daniel Pfankuch. Mr. Pfankuch --
12 when Detective Diskin interviewed him, Mr. Pfankuch
13 told the detective he suffered heat stroke.

14 THE COURT: I understand that. That's why I
15 said if that -- I don't know if the medical records
16 were available at that time or not. That's why I
17 said I'm not -- I'm not making any pronouncement
18 that this was some kind of an intentional,
19 misleading, or anything of the kind. I try to make
20 that clear.

21 But the point is right now turned out not
22 to be accurate.

23 MS. POLK: I don't agree with that, Your
24 Honor. I believe that the evidence would support
25 that he had suffered from -- along that continuum,

1 very close to heat stroke. What was in that
2 PowerPoint and what's in --

3 THE COURT: I want to ask a second. That
4 such -- I think that's so critical to what creates
5 the problem we have again and again. And maybe I'm
6 missing something. But I'd like a response from
7 the defense.

8 Is that really a de minimis distinction
9 between heat exhaustion and heat stroke?

10 MR. KELLY: Absolutely not, Judge. Absolutely
11 not.

12 THE COURT: I thought doctor --

13 MR. KELLY: I'm sorry. We've referenced
14 Dr. Mosley who -- and you have the transcript,
15 Judge. And we've discussed it with him. We've
16 discussed it with Dr. Lyon. We discussed it with
17 Dr. Cutshall. We discussed it with Dr. Paul.

18 All of the medical testimony and
19 interviews in this case points out exactly what the
20 Court is trying to point out, is that heat stroke
21 is a much different physiological phenomenon of an
22 individual versus heat exhaustion.

23 And that continuum of heat, again, is
24 individual to the individual's physiology, not six
25 years of sweat lodges. That is not de minimus.

1 It's entirely misleading, and it's entirely -- it's
2 completely prejudicial and inaccurate.
3 We have the records -- and I apologize
4 for my passion. But we have the records of these
5 people. We have the actual doctors who can provide
6 this testimony. And, again, it's beyond me why
7 Detective Diskin --

8 Imagine this hypothetical: So a
9 detective in an investigation erroneously
10 interprets a medical report, some highly
11 prejudicial information, and then on -- and then he
12 gets to come to trial, and we potentially taint the
13 jury with that information? That's just not right.
14 Or continue to imply that lay witnesses, like the
15 Mercers, can draw this conclusion when we have
16 actual experts that say you can't do that? I --
17 it's not de minimus, to respond to your question,
18 Judge.

19 THE COURT: It was -- not my belief. I
20 just -- I'm going to ask that -- if I have to get
21 it from Mina, I'll do that. I want -- I want the
22 transcript from Dr. Lyon when he talked about heat
23 stroke and the contrast. I want to see that.

24 Because, Ms. Polk, I think he made a
25 drastic distinction in that.

1 And now -- I think you're telling me that
2 it really wasn't much of a difference to say a
3 nonemergency situation of heat exhaustion was the
4 same as telling a doctor somebody had suffered a
5 heat stroke.

6 MS. POLK: Your Honor, respectfully, I did not
7 say that. I was starting to give you my
8 explanation, and then Mr. Kelly was allowed to
9 speak.

10 If I can explain the complete scenario
11 surrounding Daniel Pfankuch and what
12 Detective Diskin learned in the investigation and
13 then why Detective Diskin gave that information
14 during the PowerPoint to the medical examiners.

15 His investigation consisted of
16 interviewing numerous people from the 2005 event
17 who were there when Daniel Pfankuch suffered
18 illness. And that includes David Duhaime, Mickey
19 Reynolds, Amayra Hamilton, and some other
20 individuals.

21 What they all had told Detective Diskin
22 and would testify, if they were allowed to testify
23 in the case, is that Daniel Pfankuch came out of
24 the sweat lodge, that he was crazy, hitting and
25 kicking people, that he went down, that he was

1 unconscious. Everybody there says Mr. Pfankuch was
2 unconscious.

3 THE COURT: Amayra Hamilton didn't say so.
4 Her testimony was to the effect, well, his eyes
5 were open and -- you know -- he wasn't really
6 responding.

7 So the one -- one witness I actually
8 heard from on the stand did not support
9 unconsciousness.

10 MS. POLK: And it's not clear to me at one
11 point -- at what point Mrs. Hamilton came down to
12 the scene. And I don't have that transcript in
13 front of me.

14 And Your Honor, I understand that you
15 haven't heard from the other witnesses. I'm just
16 trying to explain what Detective Diskin had learned
17 and why that forms the course of his investigation.

18 THE COURT: Had he learned that there was a
19 heat stroke? Has a -- did any doctor ever look at
20 that information, whether it's from the witnesses,
21 whether it's from the hospital, and say there was
22 heat stroke?

23 MS. POLK: No, Your Honor. But doctor -- when
24 Mr. Pfankuch -- again, multiple witnesses will say
25 that he was unconscious, that he had a faint pulse,

1 that they -- that there was a debate, there was
2 delay as the staff was refusing to call 9-1-1.

3 Finally, Amayra Hamilton called 9-1-1,
4 and then this witness is transported. And at that
5 point had been cooled down, the hospital then
6 treats him. There is no diagnosis in the medical
7 records.

8 At that point, though, some time has
9 passed and he is discharged with instructions to
10 treat heat exhaustion. Mr. Pfankuch, when
11 detectives interviewed him, told the detective that
12 he had suffered heat stroke.

13 What we know from the testimony of the
14 medical experts is that heat -- there's a continuum
15 of heat and that at one extreme is heat stroke. At
16 one extreme are mild heat-related rashes. And we
17 know that the doctors have said that along that
18 continuum toward the end of heat stroke, ultimately
19 resulting in death, are altered states of
20 consciousness and then unconsciousness, both of
21 which witnesses observed Mr. Pfankuch suffer.

22 There is no doctor that ever looked --
23 that we're aware of who ever made that
24 determination. But based on medical information,
25 it's not unreasonable to conclude that Mr. Pfankuch

1 had suffered from heat stroke. And that's what
2 this detective has relayed during that meeting back
3 in December with the medical examiners.

4 I'm just trying to explain to the
5 Court --

6 THE COURT: But you -- so a doctor has told
7 you now that it looks like it was heat stroke?

8 MS. POLK: I -- no. Not that I know of. I
9 don't --

10 THE COURT: Ms. Polk, so you're saying you
11 looked at the medical records and you've decided
12 that it's logical to conclude heat stroke for
13 Daniel P.?

14 MS. POLK: I do believe that, Your Honor. We
15 have had expert testimony about this continuum of
16 heat-related illnesses. We have witnesses who were
17 there at the scene who saw Mr. Pfankuch in an
18 altered state, kicking, and bizarre behavior. His
19 wife would testify about that. We have witnesses
20 who say that he then went down and that he was
21 unconscious.

22 So we have medical testimony that tells
23 us what the signs and symptoms would be of
24 heat-related illness along that continuum and
25 altered state of consciousness, as well as going

1 unconscious, are at the extreme end of that
2 continuum. So yes. It is reasonable to conclude
3 that Mr. Pfankuch suffered at -- toward that
4 extreme.

5 I'm explaining, Your Honor, that
6 Detective Diskin, what he knew at the time from
7 talking to the witnesses, and from Mr. Pfankuch,
8 who told the detective, I suffered heat stroke.

9 And it is not unreasonable knowing -- in
10 the context of medical testimony, it's not
11 unreasonable to conclude that Mr. Pfankuch was at
12 that extreme end on that heat continuum.

13 THE COURT: Based on what nondoctors believe?

14 MS. POLK: No, Your Honor. Based on medical
15 testimony, and it's based on personal observations
16 by witnesses at the scene of what they physically
17 saw. That's -- that's not unreasonable to
18 conclude.

19 THE COURT: It may -- it may turn if all that
20 information were given to a physician who
21 understands. I heard Dr. Lyon being very cautious
22 about what he would say about what the actual --
23 even a doctor -- about what the effects are. That
24 isn't his area. He's recalling from medical school
25 and what he might have read here and there. But --

1 MS. POLK: And the state does have an expert,
2 Dr. Dickson, who will come in and testify again
3 about the heat continuum.

4 THE COURT: Has he been interviewed, by the
5 way?

6 MR. KELLY: He has, Judge.

7 And may I respond briefly?

8 THE COURT: No. I want Ms. Polk to be able to
9 finish.

10 MS. POLK: And then, Your Honor, with respect
11 to Daniel Pfankuch, the EMS report shows that his
12 eyes were rolled back in the back of his head. And
13 again, we've had medical testimony about that heat
14 continuum. And, again, that would be -- that
15 actually would be a medical observation of
16 Mr. Pfankuch at the time.

17 We're talking about this, Your Honor,
18 because this is information that was given to
19 Detective Diskin. And the Court had questioned
20 Detective Diskin's statement in the PowerPoint that
21 Mr. Pfankuch had suffered heat stroke. These are
22 all the reasons why Detective Diskin concluded that
23 Mr. Pfankuch suffered heat stroke.

24 My personal belief is that, based on the
25 personal observations of the witness, based on the

1 EMS report with the eyes rolled back into the head,
2 based on Mr. Pfankuch's statement that he suffered
3 heat stroke, and based on the medical testimony
4 that we've already had in this trial, that it's
5 very reasonable to conclude that Mr. Pfankuch
6 suffered at that extreme end of that heat continuum
7 some degree of heat stroke.

8 And I'll tell you, the experts are
9 disagreeing about the language to use now. There
10 is no bright line at what point you suffer heat
11 stroke as opposed to heat-related illness.

12 THE COURT: And that relates to what I'm
13 saying. There's this continuum. At some point
14 there's a difference in kind. And that's the point
15 I'm making. Yes.

16 MS. POLK: I think it's not unreasonable to
17 conclude that Mr. Pfankuch suffered at the extreme
18 end of the heat continuum -- signs and symptoms at
19 the extreme end of heat-related illness.

20 THE COURT: As I recall from -- again, what I
21 have is the testimony that was here, that's
22 actually presented, about how there was even a
23 question as to whether or not he was going to go to
24 the hospital. But -- okay.

25 Ms. Polk, again, I'm just saying from

1 what -- I heard Dr. Lyon make a distinction here.
 2 And then I -- I look at that information that just
 3 categorically said this was heat stroke. And it
 4 may be reasonable to get there. I guess you've
 5 already talked to Dr. Dickson, so there was a
 6 medical basis to make that suggestion at the time
 7 that it was presented?

8 MS. POLK: Yes. And what the detective had
 9 presented to the medical examiners were several
 10 pages in the PowerPoint summarizing what witnesses
 11 had told him about those signs and symptoms,
 12 including Mr. Pfankuch being combative, suffering
 13 unconsciousness, and the delirium.

14 And Your Honor, there was a debate over
 15 the PowerPoint. The detective made it clear at the
 16 time that that was his summary of what he knew at
 17 the time and was presenting it to the medical
 18 examiners and to the attorneys for a charging
 19 decision.

20 The state had taken the position that
 21 this was a draft, and the detective had made it
 22 clear that this was the information he was
 23 summarizing for us.

24 And, Your Honor, we did not talk to
 25 Dr. Dickson prior to that PowerPoint presentation

1 to the medical examiners. Dr. Dickson was retained
 2 later. That was a December meeting, just a month
 3 and a half after the event. And it was an
 4 informational meeting.

5 We've had this discussion about why the
 6 state took the position that this was work product,
 7 and the Court disagreed with us. I respect that
 8 ruling. And that PowerPoint was then provided to
 9 the defense attorneys.

10 But we had made it clear at the time that
 11 this was information that the detective had
 12 gathered and was -- and he made it clear when he
 13 presented this. There's several pages in this
 14 PowerPoint about what witnesses told him about what
 15 they personally observed about Mr. Pfankuch.

16 THE COURT: Mr. Kelly, did you --

17 MR. KELLY: Judge, you have a keen
 18 recollection. I believe what's been marked as
 19 Exhibit 909 on direct examination of Ms. Hamilton,
 20 she says, in response to, what did you become aware
 21 of in regards to Daniel Pfankuch?

22 And her answer was, my understanding that
 23 this was a typical example of a person that was not
 24 fully back into his body. He was not unconscious
 25 because he was moving.

1 And that's one of the inquiries you had,
 2 Judge. And, of course, the transcript has been
 3 marked. I understood your question at the
 4 beginning of this proceeding to be what to do with
 5 misrepresentation provided by the detective. And
 6 you had even suggested Rule 614 in that regard,
 7 perhaps some interrogatories from the Court.

8 And I want to point out, Judge, and I
 9 don't know the exhibit number, but I have a copy of
 10 the -- a correct copy of the PowerPoint
 11 presentation. And it says he was originally
 12 diagnosed with heat stroke and dehydration. And I
 13 wasn't present at the presentation, but that is
 14 what the PowerPoint says.

15 On that date, December 14, 2009,
 16 Detective Diskin had Daniel Pfankuch's medical
 17 reports. They have been marked as an exhibit in
 18 this case. And they do note --

19 THE COURT: So it's presented as the original
 20 diagnosis when you had the records before? I'm
 21 learning that now?

22 In other words, there was a PowerPoint
 23 presented, and it wasn't even provided to the
 24 defense even though the medical examiner is going
 25 to use this for an opinion. And that PowerPoint

1 included the statement that the original diagnosis
 2 was heat stroke.

3 MR. KELLY: I read that word for word.

4 THE COURT: And the state had the records
 5 prior to that saying it was heat exhaustion?

6 Is that the real chronology, Ms. Polk?
 7 That's what I want to know.

8 MS. POLK: Your Honor, if counsel could tell
 9 me what page he's looking at.

10 MR. KELLY: I'm looking under Daniel
 11 Pfankuch -- and it's Bates stamp 4916. And the
 12 medical records were admitted during a November
 13 hearing. And it's our understanding they're in the
 14 possession --

15 THE COURT: Well, I -- I brought that up as an
 16 illustration primarily about what it means to just
 17 put testimony out there about what people say and
 18 how it's important to be cautious about that. I
 19 wasn't trying to raise that as any independent
 20 issue, and somehow it's become the focus.

21 But I wanted to point out that how easy
 22 it is to take a belief or what you think from an
 23 interview and somehow translate it through an
 24 officer who carries considerable weight because of
 25 who he is in his job and presenting that as a

1 conclusion. That was really the point I was trying
2 to make. I wasn't trying to get back into this.

3 MS. POLK: And, Your Honor, I understand that.
4 I just want to respond.

5 Again, this PowerPoint. It was made
6 clear that this was a draft. This was information
7 the detective had. Detective Diskin had not seen
8 any medical records when he put together this
9 PowerPoint in December. We can find out for the
10 Court if the Court wants to know.

11 THE COURT: I don't -- I don't want to do
12 that. That's -- I did not want to open up that. I
13 want to move ahead with the trial. We're not going
14 to keep the jury just waiting and waiting anymore.
15 That's going to stop.

16 MS. POLK: But, Your Honor, I'm looking at the
17 medical records, the EMS report. And I just want
18 to read what that EMS report says.

19 The medical record at the hospital, there
20 is no diagnosis. There is discharge instructions
21 for heat --

22 THE COURT: Exhaustion and dehydration.

23 MS. POLK: -- exhaustion and dehydration. But
24 this is what the EMS report says, -- and this is
25 the paramedic -- that the patient was fine when he

1 went in and it was -- it appeared he was fine
2 during the ceremony. A bystander stated that he
3 did not want to get out when the ceremony was over,
4 and he stated that he wanted them to just let him
5 die.

6 His wife -- this is Mr. Pfankuch's
7 wife -- stated that when he came out, the patient
8 was acting aggressive and strange for him. She
9 stated that he was trying to do handstands and
10 wanted to fight with everyone. He then passed out
11 and could not be aroused.

12 A bystander stated that she checked his
13 pulse, which was racing, so she decided to call
14 9-1-1. The patient was in the middle of a crowd of
15 people being held up by them. His eyes were rolled
16 back in his head and he was unresponsive. And that
17 last part is the observation of the paramedic.

18 So, again, the conclusion that he
19 suffered from an extreme form of heat illness is a
20 very reasonable conclusion.

21 THE COURT: Well, I'm wondering if people lose
22 consciousness from a vasovagal event. Are they
23 similar kind of things? I don't know. I'm not a
24 doctor.

25 MR. KELLY: Your Honor, in response to an

1 earlier question, in regards to Dr. Lyons's
2 testimony on the transcript of the reporter's
3 proceeding, March 31, 2011, page 56, line 9. In
4 response to the direct question of Ms. Polk, the
5 question was: And let's move now onto the topic of
6 heat-related illness. Can you explain what some of
7 the common heat-related illness or heat-related
8 syndromes are.

9 And his response, Judge, is identical to
10 your recollection. Well, there's heat exhaustion
11 where people are -- they become hot. Their body
12 temperature increases. They sweat. They may get
13 dizzy, light-headed, pass out, have nausea,
14 vomiting, diarrhea, repaid heart rate, rapid
15 breathing.

16 Then he goes further to say, if that's
17 left untreated, it may progress to heat stroke,
18 which is life-threatening condition where the body
19 can no longer compensate for it's elevated body
20 temperature. And the person develops central
21 nervous system abnormalities, which -- possibly
22 organ dysfunction resulting in death. That was the
23 doctor's response. And that's the state's witness.

24 And, again, Judge, I -- you were correct
25 in your assumption as to what Amayra Hamilton had

1 said back in November and correct -- not
2 assumption, but recollection. And correct in your
3 recollection in this regard.

4 And, again, I'd emphasize -- I thought we
5 were talking about this difficult position we're in
6 when we have a detective who has no medical
7 background and is relying on lay witness statements
8 over a six-year time period and focuses an
9 investigation down that path related to heat and
10 draws certain conclusions and then actually makes a
11 misrepresentation during a December 14 presentation
12 to the medical examiners. And what should we do
13 about that?

14 I'm reluctant to cross-examine the
15 detective on his erroneous information during his
16 presentation in fear of opening the door. I'm
17 between a rock and a hard spot in terms of what to
18 do.

19 And I did read Rule 614. I've been at
20 this job a long time. I've never seen that during
21 the jury trial, but it does exist.

22 And again -- you know -- I'd simply
23 reemphasize all our arguments regarding the
24 admissibility of this. I don't want to bore the
25 Court. I think you fully understand them. But I

1 would like at the appropriate time to -- I believe
2 the witness needs -- the witness needs to be
3 instructed by the Court as to the limits of his
4 testimony.

5 And, secondly, I believe the jury is
6 entitled to a limiting instruction as to its use.
7 And I think we have some proposed language in that
8 regard.

9 And we also had filed this morning, we're
10 requesting a limiting instruction in regards to the
11 shifting burden, which was brought up yesterday.

12 MR. LI: And, Your Honor, I'm very sorry to
13 interrupt this proceeding with that particular
14 issue. I wanted to lay a record about it
15 yesterday.

16 THE COURT: We're going to deal with things
17 that we need to in order.

18 Ms. Polk, I've indicated the parameters.
19 And they -- and they have to do with discussing the
20 focus on the heat, on the investigation -- you
21 know -- this investigation was done and noting that
22 there was a difference. And that's where the focus
23 is.

24 Mr. Kelly, what I wanted to get to was
25 the next part, which you wanted to bring up before

1 we reached this, and that was what happens -- how I
2 avoid opening the door. You know, that's your
3 concern. Again, I don't want to be telling people
4 what to -- to do.

5 And as I've indicated, it's just going to
6 have to be questions. If there's some suggestion
7 that -- that there wasn't time spent or -- you
8 know -- thoroughness or something of that -- well,
9 thoroughness. That's -- I take it that's where
10 you're headed. But I just -- I can't say.

11 I just -- I don't know. But at some --
12 I've said, if people are going to attack somebody
13 in the investigation, that person has to be able to
14 present a fair picture. That's -- that's just how
15 it is.

16 MR. KELLY: And, Judge, what the actual facts
17 are in this case --

18 THE COURT: From their perspective.

19 MR. KELLY: The actual facts, untainted by
20 attorney persuasion, is that on
21 November 17th, 2009, Detective Willingham, I
22 believe it is, went to the medical center, got
23 Daniel Pfankuch's medical records, and gave them to
24 Detective Diskin.

25 Less than a month later he makes a

1 presentation in front of the medical examiners.
2 During that time period, based on his direct, he
3 spent a great deal of time going around this
4 heat-related path, and then he misrepresents on
5 December 14th what the medical records say.

6 I'm now standing here -- I've got some
7 great exculpatory information. That impunes the
8 investigation conducted by Detective Diskin. And I
9 should be able to ask questions about the
10 misrepresentation made to the medical examiners,
11 which may have affected their conclusion as to the
12 cause of death. And I can't do that without fear
13 of opening the door to what I would submit, Judge,
14 based on Dr. Mosley and Dr. Lyon and these other
15 medical experts, is improper testimony.

16 THE COURT: Ms. Polk.

17 MS. POLK: Your Honor, again, if Mr. Kelly
18 wants to question Detective Diskin about
19 representations made in that meeting, I think that
20 he can. But this detective then is entitled to
21 explain what he knew at the time, and what his
22 belief was based on that information.

23 Mr. Kelly -- in spite of the explanation
24 that the state just gave about the fact that
25 Detective Diskin had not seen any medical records

1 at the time of that December meeting, Mr. Kelly
2 just said to the Court that the detective
3 misrepresented the medical record. And this
4 detective had not seen medical records.

5 I think I've made a pretty clear record
6 on what the detective had at the time. And, again,
7 it is a reasonable conclusion that Daniel Pfankuch
8 had suffered from heat stroke. And if Mr. Kelly
9 wants to quibble with that reasonable conclusion,
10 this witness is entitled to explain all of the
11 information he had that made him conclude that --
12 including Daniel Pfankuch's statement that he
13 suffered from heat stroke that made this detective
14 write that in the PowerPoint that Daniel Pfankuch's
15 diagnosis was heat stroke. Because that comment
16 came directly Daniel Pfankuch. He told the
17 detective he had suffered heat stroke.

18 MR. KELLY: Judge, for the record, I have
19 marked the police report. It's Exhibit 990 for
20 purposes of identification in this case as to the
21 basis of my belief that this detective knew of, had
22 in his possession -- whether he read them or not, I
23 don't know -- but had in his possession, the
24 medical records from Daniel Pfankuch prior to
25 December 14.

1 And, Judge, I'm not quibbling.

2 THE COURT: And I -- I don't see how it would
3 open the door if there's a statement, this is the
4 original diagnosis, and there was no original
5 diagnosis to that effect, to say, but based on all
6 this other information I made my own conclusion
7 there was a diagnosis. I don't see how it would
8 open the door to just say, well, I just took a stab
9 at it without talking to a doctor. I don't think
10 that would open the door.

11 But then again, things can be pressed.
12 And in this trial there's a lot of detail. There's
13 a lot of time spent on certain things. And at some
14 point it just opens the door.

15 MS. POLK: And, Your Honor, this is -- and I'm
16 looking at the transcript of the interview of
17 Detective -- of Daniel Pfankuch by Detective
18 Diskin. And when Detective Diskin said to
19 Mr. Pfankuch, have you researched at all the
20 effects of hyperthermia to see if maybe that could
21 have been the cause of your symptoms, Mr. Pfankuch
22 says, no. I haven't really.

23 Detective Diskin says --

24 THE COURT: He suggests that he ought to. I
25 remember reading that very distinctly. He says,

1 well, you might want to do that. You might want to
2 see a doctor because there can be some sequelae in
3 the future -- he didn't use that word. But I think
4 that goes into that. That's the gist, isn't it?
5 Because I recall reading that.

6 MS. POLK: Yes. He was. Because of Daniel
7 Pfankuch's behavior today, Detective Diskin was
8 saying maybe there's some follow up.

9 But anyway, then Detective Diskin says,
10 do you remember what the hospital said was wrong
11 with you?

12 Daniel Pfankuch said, heat stroke, I
13 believe, and severe dehydration.

14 Okay.

15 Daniel Pfankuch said, they hooked me up
16 to IV and filled me full of fluids for many hours,
17 et cetera.

18 So to suggest that when this detective
19 puts into a PowerPoint the word "heat stroke" that
20 somehow that's a misrepresentation when he's been
21 told by the patient himself that the hospital told
22 him he had suffered heat stroke -- if Mr. Kelly
23 wants to go there, the witness gets to explain why
24 he writes in there the original diagnosis was heat
25 stroke.

1 MR. KELLY: I agree with that. But I don't
2 believe that opens door to 75 interviews between
3 2003.

4 THE COURT: It wouldn't. But probably --
5 yeah. If that comes in, the story is going to be
6 told about how that got in that -- in that
7 PowerPoint.

8 MR. KELLY: You know -- if the detective wants
9 to rely on a biased witness, lay person's diagnosis
10 versus medical records --

11 THE COURT: And Mr. Li, you want to talk about
12 the burden of proof instruction. And I know it
13 talks about it being contemporaneous. And I asked
14 for research on that, and you provided it.

15 MR. LI: Yes, Your Honor.

16 THE COURT: I'll just say, Ms. Polk -- and I'm
17 inclined to do this. I'm going to give the state a
18 chance to look at the cases, though. I'm not --
19 I'm not going to do it before lunch. But my
20 inclination is to provide some kind of an
21 instruction. And I understand the importance of
22 contemporaneousness.

23 But, Mr. Li.

24 MR. LI: Okay, Your Honor. I guess the point
25 is -- and I would really want -- I'll be honest

1 with you, Your Honor. I've never heard that line
2 of questioning before. I saw some very hard looks
3 from the jury at us as if we had done something
4 wrong in not sharing information and helping the
5 state prove its case.

6 And I think it's critical that there be a
7 very quick link between those -- that line of
8 questioning and -- and this instruction. I've just
9 literally never heard that line of questioning
10 before in 20 years of practice. And it's very
11 dangerous.

12 So I would ask that -- that this
13 instruction be given as quickly as possible. And
14 it is the law, and we cited cases -- we cited the
15 exact -- some of the cases that she cited -- or the
16 state cited themselves, which also discuss a
17 curative instruction.

18 THE COURT: I read those cases, the Arizona
19 cases.

20 Mr. Hughes.

21 MR. HUGHES: Thank you, Your Honor.

22 Your Honor, I do want to read the cases
23 Mr. Li cited. The state's not opposed to a
24 contemporaneous instruction. I've got some issues
25 with the proposed language in the instruction

1 prepared by the defendant. For one thing, they're
2 adding in an instruction on intervening cause,
3 which doesn't have anything to do the burden
4 shifting.

5 I would point out -- and again, I'll look
6 at the cases Mr. Li cited, but we cited yesterday
7 the McDougall case. In the McDougall case, the
8 Supreme Court mentioned the trial court denied the
9 motion and instructed the jury the defendant is not
10 required to produce any evidence or to prove his
11 innocence.

12 I think that's just sort of a
13 contemporaneous instruction that would be
14 appropriate here, which would be something similar
15 to that as discussed and by the supreme court in
16 the McDougall case where there are some standard
17 RAJI instructions, obviously the Portillo
18 instruction, and then standard criminal No. 16,
19 which is the evidence of any kind.

20 I think if the Court was inclined to go
21 past recital of what McDougall says, those would be
22 the appropriate ones. And, again, I -- I would
23 like to make more of a record, but I realize it's
24 9:40. And I would like to look at those cases.

25 MR. LI: Your Honor, the critical issue here

1 is that it's not just to cure some smaller error,
2 but it's a long line of questioning suggesting not
3 only a burden shifting issue, which is what the
4 McDougall case deals with, but also what the Court
5 pointed out yesterday, which is the suggestion
6 that, quote, the implication that the defense
7 somehow has to tell the state what might be
8 important, and the implication that the defense has
9 to somehow explain when they might have thought of
10 information and -- and implications about what they
11 should do in an interview.

12 It's two parts. One is the burden
13 shifting, which is what McDougall dealt with and
14 which then can be cured by an instruction as to
15 what the actual burdens of proof are.

16 But the second part about that entire
17 line of questioning that the Court did identify and
18 that we also objected to is the idea that we're
19 supposed to -- that the defense is supposed to
20 provide the state with information that we have,
21 disclosure obligations, almost a reverse Brady,
22 which simply doesn't exist.

23 And the jury needs to understand that
24 it's not improper for -- for Ms. Do and I during
25 interviews with -- with the detective and with

1 medical examiners and what have you to use strategy
2 to figure out what the best way to present -- you
3 know -- a defense theory is. That's not improper.

4 But there was the suggestion through the
5 tone in the questioning, and I think the Court
6 acknowledged that and saw that in the jury, that
7 through the tone of the questioning and all of the
8 sorts of things, that there was an implication that
9 somehow the defense was doing something improper.

10 And so it's critical that this jury be
11 instructed that the defense does not have a burden
12 to tell the state what its evidence is and to help
13 the state prove its case and to point out the
14 weaknesses in the state's case.

15 THE COURT: All right. I've never heard that
16 line of questioning either. And I've -- I've had
17 instances in trial where something's said, and I
18 immediately just say -- you know -- you can't
19 consider silence and that kind of thing. It just
20 spontaneously comes out.

21 I heard the line of questioning, and then
22 it was repeated, repeated, repeated -- you know --
23 and every aspect to make a point again and again
24 and again. And I -- I just had never -- had never
25 confronted that that I can recall.

1 Mr. Hughes.

2 MR. HUGHES: Your Honor, the arguments Mr. Li
3 is making are very, very similar to what was in the
4 McDougall and the Lehr cases that were cited
5 yesterday. The problem with the phrasing of the
6 instruction, not only does it go into this
7 intervening act, which is a separate issue, but it
8 also -- the first paragraph ignores the inference
9 that the Supreme Court has instructed a jury can
10 make, which is that the defendant who fails to
11 produce potentially exculpatory evidence is an
12 inference the jury can consider.

13 And this instruction ignores that
14 inference that is discussed by the Supreme Court in
15 McDougall and in Lehr. And. If anything, it -- it
16 would suggest that that inference could not made.
17 So I think that inference would need to be added
18 because that is an appropriate statement of the law
19 if an instruction were to be broader, for example,
20 than the very limited instruction that McDougall
21 discusses.

22 MR. LI: Your Honor, if I may. The difference
23 between McDougall case and this particular case is
24 that in McDougall the issue was what was being
25 presented to the jury. And that was the idea that

1 somehow the defense had -- had some obligation --
 2 had some blood samples and just didn't -- you
 3 know -- had some tests and didn't provide it to the
 4 jury. And then McDougall said, well -- you know --
 5 prosecution didn't comment on that.

6 This is a different case. This is
 7 actually what the defense has to provide -- or
 8 frankly, the defense doesn't have to provide
 9 anything to the prosecution during the pretrial
 10 phases of this case. That's a completely different
 11 scenario.

12 And -- and the -- and the idea that the
 13 state can impose on the defense some obligation
 14 to -- and imply that to this jury and impose on the
 15 defense some obligation to provide evidence against
 16 itself and to explain why Detective Diskin should
 17 have looked at one thing versus or another or to
 18 fill in the various gaps in the investigation,
 19 that's just not the law. And this jury needs to be
 20 instructed on that.

21 That's the problem that -- there's two
 22 problems that I think the Court noted yesterday.
 23 One problem is the burden shifting. That's what
 24 McDougall deals with. The other part is this
 25 implication -- improper implication that the

1 defense has to somehow fill in the gaps for the
 2 prosecution.

3 And I will tell you -- I mean, I've been
 4 on the prosecution side and on the defense side.
 5 I've never asked a line of questions ever like that
 6 in my entire career. And I've never heard a line
 7 of questions like that in my entire career. And I
 8 watched the jurors writing down notes, looking at
 9 Ms. Do and I as Ms. Polk kept on saying, and Ms. Do
 10 to didn't mention, duh, duh, duh, et cetera. And
 11 looking at us as if we had done something wrong.
 12 And that is the -- the -- the -- what needs to be
 13 cured.

14 MR. HUGHES: Your Honor, this -- McDougall is
 15 on point. But the Lehr case, which dealt
 16 specifically with the line of questioning about was
 17 the state's evidence available to the defense, did
 18 the defense ever take an opportunity to inspect
 19 that by their own expert for the fingerprints that
 20 were on the state's evidence, that is exactly the
 21 situation that we're confronted with here, and it's
 22 appropriate line of questioning.

23 In fact, in the Lehr case, the prosecutor
 24 went much further than Ms. Polk did yesterday as
 25 far as the questions that were asked. The Lehr

1 case is -- is, I would submit, directly on point
 2 that it's appropriate for the state to explore that
 3 this evidence is available, that the defendant
 4 chose for whatever reason not to have the evidence
 5 tested, and that the inference the jury can then
 6 draw from that -- from the defendant's failure
 7 to -- to have that evidence tested.

8 THE COURT: Mr. Hughes, I thought the
 9 testimony so far is that there really isn't -- some
 10 of the most important evidence would not be
 11 available. Hasn't that been -- I mean, again, I'm
 12 not commenting on the evidence. But isn't there
 13 evidence to that effect so far?

14 MR. HUGHES: Your Honor, the evidence is there
 15 are soil samples available. There are tarps that
 16 are available for testing. The wood that that
 17 structure was built out of is available. The
 18 fluids that people had in their drink bottles are
 19 available. All of that is available for testing.

20 There has been some evidence that the
 21 blood that was drawn from the decedents -- and this
 22 is testimony by Dr. Lyon -- may not any longer be
 23 reliable at this point in time, is what Dr. Lyon
 24 stated. For testing that was some 17 months
 25 afterward.

1 There hasn't been testimony that the
 2 blood would not be available or not have been
 3 reliable for testing earlier in the proceedings
 4 after the indictment, for example. So that
 5 evidence is not in.

6 Mr. Li mentioned yesterday, and he has
 7 apparently an opinion that evidence of chemicals in
 8 the blood disappears after three days. And I've
 9 heard him mention that to the Court yesterday. I
 10 don't know of any testimony that supports that
 11 position. I know they do have an expert, Dr. Paul.
 12 Perhaps Dr. Paul will lay that. He didn't mention
 13 that in his interview.

14 And if there is that evidence, and that
 15 would be something the jury, in making this
 16 inference, would be entitled to consider. At this
 17 point there's been no evidence that -- that this
 18 disappears from the blood within three days.

19 MR. LI: I was simply pointing out a fact that
 20 I've become aware of by doing research. And we
 21 have an article that says organophosphates
 22 dissipates quite quickly in the blood.

23 The only point -- that was only -- the
 24 only point in making that is we didn't have a
 25 chance to test the blood. Mr. Ray was indicted

1 four months -- four months after the -- the folks
2 passed away.

3 And I think the Court is also correct
4 that, yes, there are pieces of evidence that the
5 state did collect. We're -- we're looking at them
6 right here. But there are many pieces of evidence
7 the state chose not to collect. And we can't test
8 what doesn't exist. So that's the problem there.

9 But more importantly, Your Honor, I think
10 Mr. Hughes is perhaps unintentionally blurring the
11 difference between whether or not the defense could
12 have, should have, would have, tested various
13 objects to find some various results. And we've
14 kind of -- we've pointed out all the deficiencies
15 in that argument.

16 Blurring the distinction between that and
17 whether or not the state can suggest to this jury
18 that the defense has an obligation to provide
19 information to the state to fill in gaps, to tell
20 the state what our defense theory is, to tell
21 Detective Diskin, hey. You should have looked at
22 this. That's -- that's the distinction. And
23 that's what needs to be cured. Because that
24 suggestion by the state was that somehow the
25 defense -- specifically, myself and Ms. Do --

1 somehow did something wrong. And I -- I just never
2 had this experience.

3 THE COURT: And you mentioned that, Mr. Li.

4 MR. LI: Thank you, Your Honor.

5 THE COURT: And I -- I haven't either. That's
6 not something I can recall anyway in having dealt
7 with.

8 I'm not going to give this this morning.
9 I indicated -- I want to look at the Marshall case
10 that's cited here, the specific language. And I
11 want the state to have an opportunity to look at
12 this.

13 But most likely I'll be giving some form
14 of instructions right at the start of the afternoon
15 session.

16 Thank you.

17 MS. POLK: Your Honor, I have one more issue
18 for Detective Diskin's testimony. And that's what
19 the state would be offering the articles of
20 incorporation for James Ray International. I have
21 the ruling from the Court on the -- we had done our
22 15.6. The Court had indicated that it's
23 admissible. And I would intend to be offering that
24 through the completion of Detective Diskin's
25 testimony.

1 THE COURT: I indicated a portion.

2 But, Mr. Kelly.

3 MR. KELLY: Yeah, Judge. I -- we would renew
4 our objection. I'll leave it at that and -- and
5 ask that the state comply with the Court order.

6 THE COURT: Yes. I mentioned -- the specific
7 thing you wanted to show was corporate structure,
8 hierarchy, officers, and those things?

9 MS. POLK: Yes. We've marked it as an
10 exhibit, the articles of incorporation.

11 THE COURT: Okay. And I mentioned in the --
12 in the ruling -- and I don't -- one of the things
13 that the state had objected to in their written
14 response had to do why -- why all of the articles
15 and -- and I understand Mr. Kelly spent a lot of
16 time with the -- on the easel. And there was
17 discussion about who does what and that kind of
18 information.

19 And I thought that's what you wanted to
20 actually get the document in and you'd have
21 foundation for that.

22 MR. KELLY: Judge, we would stipulate that
23 James Ray was the president of James Ray
24 International, if that's its purpose. Again, I
25 never thought that was a disputed fact, even a

1 relevant fact. But --

2 MS. POLK: Judge, it's not the articles of
3 incorporation. It is the -- and this is
4 Exhibit 809, which is the list of corporate
5 officers.

6 THE COURT: Mr. Kelly, you're going to object
7 to that? Again, I don't know that the detective
8 would be a foundation witness for this if --

9 MS. POLK: Your Honor, this is a certified
10 public record. It --

11 THE COURT: Okay.

12 MS. POLK: I'm just bringing it in through his
13 testimony. But the foundation is through the rules
14 that it's a certified public document.

15 THE COURT: There's been the certification and
16 self-authentication?

17 MR. KELLY: Judge, may I approach?

18 THE COURT: Of course.

19 Are you going to be objecting to this?

20 MR. KELLY: All right. Again, Judge, I would
21 simply renew our objection. The whole purpose of
22 the chart showing how many people are in JRI was to
23 point out the lack of any personal knowledge by
24 James Ray. I just don't think this is relevant.

25 But we respect your ruling. And if

1 that's the document -- it appears to be rather
2 innocuous -- I don't have any objection.

3 THE COURT: Okay.

4 MS. POLK: Thank you.

5 THE COURT: Okay. Thank you. It'll be about
6 10:00 because Mina's had no -- no break.

7 Thank you.

8 (Recess.)

9 (Proceedings continued in the presence of
10 jury.)

11 THE COURT: The record will show the presence
12 of the defendant, Mr. Ray; the attorneys, the jury.
13 Detective Diskin is back on the witness stand.

14 And, Ms. Polk, you may continue.

15 MS. POLK: Thank you.

16 DIRECT EXAMINATION (Continued)

17 BY MS. POLK:

18 Q. Detective, you testified yesterday about
19 the numerous interviews that you have done in this
20 case, including interviews of past participants in
21 Mr. Ray's sweat lodge ceremonies, former employees,
22 and other witnesses with information.

23 Based on the totality of your
24 investigation, did you form a belief that
25 determined the direction of the investigation?

1 A. Yes. Over time, given the extensive
2 interviews that we did of -- of -- you know -- the
3 people that you mentioned -- the participants, the
4 prior employees -- we developed a belief that
5 and -- and kind of geared the investigation towards
6 the extreme way that Mr. Ray performs his sweat
7 lodge ceremony.

8 Q. And did you also form a belief as to the
9 difference between Mr. Ray's sweat lodge ceremonies
10 and ceremonies performed by other facilitators at
11 Angel Valley?

12 A. Yes.

13 Q. Did that also form the direction that
14 your investigation took?

15 A. Yes.

16 Q. Detective, I think yesterday we had
17 briefly talked about your interview of a person
18 named Michael Barber on June 10th of 2010.

19 A. Yes.

20 Q. And tell the jury who you learned Michael
21 Barber was.

22 A. Michael Barber was -- was, essentially,
23 contracted by James Ray International as their
24 audio-video guy. And so he was the person
25 responsible for recording the different James Ray

1 International events.

2 Q. And did you learn in the course of the
3 investigation that Mr. Barber had audiotaped the --
4 some of the events that occurred during Mr. Ray's
5 Spiritual Warrior seminar at Angel Valley in
6 October of 2009?

7 A. Yes. I didn't learn which events were
8 recorded, but I did learn that there was a
9 recording of portions of the Spiritual Warrior
10 seminar.

11 Q. And ultimately did you obtain a copy of
12 that audio recording?

13 A. I did.

14 Q. And did you listen to it?

15 A. I did.

16 Q. About how many hours is it?

17 A. I haven't seen it for a while, but I
18 would estimate it's about 30 hours. There were a
19 couple of days where the -- the recordings were
20 about ten hours long.

21 But during that there's some dead space
22 of when nothing was being said or -- or -- you
23 know -- it was just dead air. You might have an
24 hour or two of dead air in the middle of that.

25 Q. And you listened to all of it?

1 A. Yes.

2 Q. The various audio clips that have been
3 played here in the trial for the jury -- do those
4 clips come from that audio that you received?

5 A. Yes.

6 Q. And Detective, did listening to that
7 audio help focus your investigation as -- well,
8 perhaps I should rephrase that -- help you
9 understand what you had learned by interviewing
10 witnesses?

11 A. Yes.

12 Q. At that audio, Detective -- does it have
13 on it the Samurai Game -- the playing out of the
14 Samurai Game that several witnesses have talked
15 about?

16 A. No. It has the -- the briefing of the
17 Samurai Game where Mr. Ray explains the rules
18 and -- and what's to be expected. But it doesn't
19 have the actual game.

20 Q. And does that audio have on it the events
21 that actually occurred in Mr. Ray's sweat lodge
22 during the ceremony?

23 A. No.

24 Q. Does it have that briefing that occurred
25 before participants entered the sweat lodge?

1 **A. Yes. Can I just clarify that?**
 2 **There's -- there were two briefings. There was a**
 3 **briefing that was done in Crystal Hall before the**
 4 **participants went down to the sweat lodge. Then**
 5 **there was a secondary briefing actually down at the**
 6 **sweat lodge and that was not recorded.**

7 **Q.** Detective, yesterday you had testified
 8 briefly about the defendant's corporate
 9 headquarters. And I just put up on the overhead
 10 Exhibit 566, the defendant's corporate headquarters
 11 in Carlsbad, California.

12 And have you also become familiar with
 13 the Articles of Incorporation and the list of
 14 corporate officers for James Ray International?

15 **A. Yes.**

16 **Q.** And I want to refer just briefly to the
 17 diagram created by Mr. Kelly in question of Melinda
 18 Martin. Do you remember this testimony?

19 **A. I do.**

20 **Q.** And there actually were two diagrams.
 21 Do you remember that testimony?

22 **A. I do.**

23 **Q.** Did you see the list of corporate
 24 officers?

25 **A. I did.**

1 MS. POLK: Your Honor, at this time I move for
 2 the admission of Exhibit 809.

3 THE COURT: Mr. Kelly?

4 MR. KELLY: No objection.

5 THE COURT: 809 is admitted.

6 (Exhibit 809 admitted.)

7 **Q.** BY MS. POLK: And it's a certified copy
 8 from the State of Nevada listing the corporate
 9 officers, directors, for James Ray International.

10 And may I publish to the jury?

11 THE COURT: Yes.

12 **Q.** BY MS. POLK: Detective, are you able to
 13 see who is listed as president for James Ray
 14 International?

15 **A. Yes. It's James Ray.**

16 **Q.** And are you able to see who is listed as
 17 secretary for James Ray International?

18 **A. Yes. It's James Ray.**

19 **Q.** Are you able to see who's listed as
 20 treasurer of James Ray International?

21 **A. Yes. It's James Ray.**

22 **Q.** And are you able to see who's listed as
 23 director for James Ray International?

24 **A. Yes. It's James Ray.**

25 **Q.** Are you able to see who signed the filing

1 of the corporate officers for James Ray
 2 International as secretary?

3 **A. Yes. It has James Ray's name there.**

4 **Q.** I just have a few more questions,
 5 Detective. I want to ask you specifically about
 6 Kirby Brown. And I'm going to put up on the
 7 overhead Exhibit 404.

8 Have you come to learn, in fact, that
 9 this is a picture of Kirby Brown?

10 **A. Yes.**

11 **Q.** When you executed the search at James Ray
 12 International's corporate headquarters in Carlsbad,
 13 California, did you obtain some information
 14 pertaining to Kirby Brown's enrollment and payment
 15 for her participation in the Spiritual Warrior
 16 event of 2009?

17 **A. Yes.**

18 MR. KELLY: Your Honor, except for the 403
 19 issue, I'd ask that the --

20 THE COURT: I need to see the exhibit. I
 21 mean --

22 MR. KELLY: I'd ask --

23 THE COURT: Oh. Yes. I'm sorry. I thought
 24 you were talking about the ones you're looking at.
 25 There's no question pending.

1 Might have the exhibit on the screen,
 2 please.

3 MS. POLK: Your Honor, there are questions
 4 about her enrollment at Spiritual Warrior.

5 MR. KELLY: Same objection, Judge. And I have
 6 no objection to 399 and 400 and, I believe, 401,
 7 subject to prior Court ruling and thus object.

8 THE COURT: 399, 400, 401, no objection. Is
 9 that true?

10 MR. KELLY: Just the opposite, Judge. I
 11 object to 401.

12 THE COURT: Okay. 399 and 400. Those are
 13 admitted, correct?

14 MR. KELLY: Correct.

15 THE COURT: Okay.

16 Then I need to see 401, Ms. Polk, please.

17 I should see those too to get the whole
 18 context.

19 Sustained on foundation as to 401.

20 MS. POLK: Thank you, Your Honor.

21 MR. KELLY: Judge, I've been presented 408 and
 22 409. I have no objection.

23 THE COURT: 408 and 409 are admitted.

24 MR. KELLY: And I would --

25 MS. POLK: Your Honor, I haven't --

1 MR. KELLY: Same objection on --
 2 MS. POLK: Your Honor, I haven't moved for the
 3 admission of those documents.
 4 THE COURT: Okay. Then they're not. They're
 5 not. I thought you were agreeing. So we'll just
 6 wait and see what is done with those two exhibits.
 7 408 and -09 are not admitted.
 8 MS. POLK: Thank you, Your Honor.
 9 Q. Detective, I'm going to hand you exhibits
 10 401, 399, and 400. Can you take a moment to look
 11 at those exhibits, please.
 12 And do you recognize these exhibits?
 13 A. I do.
 14 Q. Where did they come from?
 15 A. The information about the registration
 16 for the event came out of Kirby Brown's client file
 17 that we found at James Ray International.
 18 Q. And was that during the execution of the
 19 search warrant?
 20 A. Yes.
 21 Q. And explain to me what you mean about a
 22 client file.
 23 A. There were several file -- filing
 24 cabinets that had multiple files in them, I assume,
 25 of all the former James Ray International clients.

1 There were hundreds of different files for
 2 different participants.
 3 Q. And did you specifically look for
 4 information pertaining to Kirby Brown?
 5 A. I did.
 6 Q. Did you also specifically look for
 7 information pertaining to James Shore?
 8 A. I did.
 9 Q. And did you also look for information
 10 pertaining to Liz Neuman?
 11 A. I did.
 12 Q. And with respect to those three
 13 individuals, did you find respective client files?
 14 A. Yes.
 15 Q. And did you then seize those files?
 16 A. I did.
 17 Q. And did you then take them into evidence
 18 and secure them, as you previously testified?
 19 A. I did.
 20 MS. POLK: Your Honor, I would move for the
 21 admission of Exhibit 401.
 22 THE COURT: Okay. And, Ms. Polk, I need to
 23 see the exhibit again.
 24 But, Mr. Kelly.
 25 MR. KELLY: Judge, again, I would object.

1 It's been subject to a pretrial ruling.
 2 THE COURT: Counsel, we're going to discuss
 3 this at -- at the recess. It's not admitted at
 4 this time.
 5 MS. POLK: Thank you, Your Honor.
 6 Q. Detective, I'm going to put up on the
 7 overhead Exhibit 412. And did you come in the
 8 course of your investigation to learn who this is a
 9 photograph of?
 10 A. Yes. It's of James Shore.
 11 Q. And as you just testified, during the
 12 execution of your search warrant did you find
 13 documents at James Ray International pertaining to
 14 an individual named James Shore?
 15 A. Yes.
 16 Q. And did you also seize those documents?
 17 A. Yes.
 18 MR. KELLY: Judge, I would stipulate to 408
 19 and 409. And then the same objection to 410.
 20 THE COURT: If 408, 409, then, are being
 21 offered, then they'll be admitted.
 22 MS. POLK: No, Your Honor. I am not moving
 23 for the admission --
 24 THE COURT: Okay.
 25 MS. POLK: -- unless the entire package is

1 going to be admitted.
 2 MR. KELLY: Oh. I misunderstood, Judge.
 3 THE COURT: Okay. Then does 409 really
 4 correspond to the information in 401? Just -- it
 5 just applies to a different person?
 6 MS. POLK: Your Honor, the -- it would be
 7 4-1-0, which should be --
 8 THE COURT: 4-1-0. That's what I meant.
 9 MS. POLK: Yeah.
 10 THE COURT: 410 is going to be discussed at
 11 recess.
 12 MS. POLK: Your Honor, I'll lay some
 13 foundation.
 14 THE COURT: Okay.
 15 Q. BY MS. POLK: Detective, I'm going to
 16 hand you exhibits 408, 409, and 410.
 17 Do you recognize those documents?
 18 A. I do.
 19 Q. Are these documents that you seized
 20 during your search warrant at Carlsbad -- the
 21 headquarters for James Ray International?
 22 A. Yes.
 23 Q. And who do these three documents pertain
 24 to?
 25 A. All three of these are for James Shore.

1 Q. And did they come out of a file at James
2 Ray International headquarters marked "James
3 Shore"?

4 A. **They did. Most of them. The -- the**
5 **waiver was found in a -- in a backpack.**

6 Q. I'm going to ask you some questions about
7 that in a moment.

8 Detective, during your investigation --
9 I'm going to put up on the overhead Exhibit 407.
10 Did you learn who this is?

11 A. **Yeah. That's Liz Neuman.**

12 Q. And during your search at James Ray
13 International headquarters in Carlsbad, California,
14 did you find documents relating -- documents that
15 bore the name of Liz Neuman?

16 A. **I did.**

17 Q. I'm going to show you what's been marked
18 as exhibits 405 and 406. Could you take a moment
19 and look through those.

20 Do you recognize these documents?

21 A. **I do.**

22 Q. Was one of these documents found in a
23 file with the name Liz Neuman on it?

24 A. **It was.**

25 Q. And where was that file?

1 A. **It was in a whole row of filing cabinets**
2 **that were at James Ray International.**

3 Q. The second document marked 405 -- where
4 did you locate that?

5 A. **That was the waiver we found in the**
6 **backpack.**

7 MS. POLK: Your Honor, at this time exhibits
8 401, 410, and 406 the state would move to admit.
9 But I understand the Court -- we're going to
10 discuss these documents at another time.

11 THE COURT: Yes.

12 MS. POLK: With respect to Exhibit 399 and
13 400, I would move for their admission. These are
14 the --

15 MR. KELLY: I have no objection.

16 THE COURT: Actually, they have been, I think.
17 399 and 400 are admitted.

18 (Exhibits 399 and 400 admitted.)

19 MS. POLK: And, Your Honor, I move for the
20 admission of Exhibit 408.

21 MR. KELLY: No objection to 408.

22 THE COURT: 408 is admitted.

23 (Exhibit 408 admitted.)

24 MS. POLK: And I move for the admission -- Oh.
25 405 is in.

1 Q. Detective, I'm going to hand you 405,
2 which is the waiver and release of liability and my
3 acceptance of responsibility at Angel Valley.

4 And will you tell the jury who signed
5 that document?

6 A. **Yes. Liz Neuman.**

7 Q. Or what name does it bear, anyway?

8 A. **Liz Neuman.**

9 Q. And I'm going to hand you Exhibit 400,
10 which is that same Angel Valley release. Will you
11 tell the jury what name is shown on that document.

12 A. **Kirby Brown.**

13 Q. And I'm going to hand you Exhibit 409,
14 which is the Angel Valley release, same document.
15 Will you tell the jury whose name is on that
16 document.

17 A. **Yes. This is James Shore.**

18 Q. With respect to these three waivers, were
19 they seized during the search warrant at James Ray
20 International headquarters?

21 A. **Yes.**

22 Q. And tell the jury where you found them.

23 A. **These were in a backpack.**

24 Q. Where was that backpack?

25 A. **The backpack was next to Megan**

1 **Fredrickson's office. And it was Megan's backpack.**

2 Q. And with respect to Exhibit 408, will you
3 tell the jury what this document is.

4 A. **These are the liability releases for**
5 **James Ray International.**

6 Q. What name does 408 bear?

7 A. **James Shore.**

8 Q. And I'm going to hand you Exhibit 409.
9 Tell the jury what document that is.

10 A. **This is the same liability release for**
11 **Kirby Brown.**

12 Q. For what organization?

13 A. **For James Ray International.**

14 Q. Detective, were all of these releases
15 found in the same location?

16 A. **I'm trying to remember now. There was a**
17 **set of releases found in Megan's backpack. And I'm**
18 **not recalling if that was the Angel Valley releases**
19 **or the James Ray International releases or both of**
20 **them were in the backpack.**

21 Q. During the course of your investigation,
22 did you come to learn who Megan Fredrickson was?

23 A. **Yes.**

24 Q. Did you come to learn whether Megan
25 Fredrickson was at the Spiritual Warrior event at

1 Angel Valley in 2009?

2 **A. Yes.**

3 **Q.** The backpack that had these releases --
4 would that be consistent with the releases having
5 been signed at the event itself?

6 **A. Yes.**

7 **Q.** That backpack you said was in Megan's
8 office?

9 **A. It was just outside the door in Megan's**
10 **office.**

11 **Q.** And what do you mean? Physically where
12 was it?

13 **A. When I saw it, it was just outside the**
14 **door going to Megan's office. And I don't know if**
15 **another detective had -- had seen that and wanted**
16 **to show it to me or if it was originally there when**
17 **we showed up just outside the office. I don't**
18 **recall.**

19 **Q.** Detective, with respect to Kirby Brown,
20 were you able to determine based on your
21 investigation whether Kirby had attended prior
22 events put on by James Ray International?

23 **A. Yes. She had.**

24 **Q.** And what -- what event did you learn she
25 had attended?

1 **A. I don't remember.**

2 **Q.** Is there a document you could look at
3 that would refresh your recollection?

4 **A. Yes. It would be the -- I believe it was**
5 **Exhibit 401. It hadn't been admitted.**

6 MS. POLK: I'm handing the witness Exhibit 401
7 to refresh his recollection.

8 **Q.** If you could look at it and let me know
9 if that refreshes your recollection.

10 **A. It does.**

11 **Q.** And after looking at the exhibit, do you
12 recall whether Kirby Brown had attended a prior
13 event put on by James Ray International?

14 MR. KELLY: Your Honor, objection. Requesting
15 a hearsay response.

16 THE COURT: Sustained.

17 **Q.** BY MS. POLK: Detective, in the course of
18 your investigation, did you determine whether James
19 Shore had attended a prior event by James Ray
20 International?

21 **A. Yes.**

22 MR. KELLY: Your Honor, same objection.

23 THE COURT: Sustained.

24 MS. POLK: Your Honor, the question was, did
25 he determine. I haven't called for the answer.

1 THE COURT: Sustained.

2 **Q.** BY MS. POLK: Did you recover at the
3 crime scene, Detective, some property that you
4 later returned to the family of James Shore?

5 **A. Yes.**

6 **Q.** Specifically at the crime scene, what
7 sorts of clothing did you recover?

8 **A. Bathing suits.**

9 **Q.** And at some point what did you return to
10 the family of James Shore?

11 **A. It was his wedding ring.**

12 **Q.** And where did you find it?

13 **A. It was in -- it was tied to one of the**
14 **swim trunks.**

15 **Q.** Recovered at the scene?

16 **A. Yes.**

17 **Q.** Thank you, Detective.

18 Thank you, Your Honor.

19 THE COURT: Thank you, Ms. Polk.

20 CROSS-EXAMINATION

21 BY MR. KELLY:

22 **Q.** Detective, you're the case agent in this
23 case; correct?

24 **A. Yes.**

25 **Q.** What does that mean to you?

1 **A. That means that I'm the detective in**
2 **charge of the investigation.**

3 **Q.** And in charge of the investigation
4 involves what?

5 **A. Overseeing the investigation.**

6 **Q.** And overseeing the invest -- the
7 investigation involves reviewing all the documents;
8 correct?

9 **A. Most of the time. Yes.**

10 **Q.** Well, would there be an occasion which
11 you -- when you would not review a document?

12 **A. I'm not thinking of any.**

13 **Q.** And I wrote up on the -- on the board
14 there 2-ethyl-1-hexanol. You ever seen that
15 chemical before?

16 **A. I don't know.**

17 **Q.** I'm handing you what's been marked as
18 evidence item 356. Do you recognize that can,
19 Detective?

20 **A. I do.**

21 **Q.** Do you know that that chemical was
22 determined from the carbon strip in that can?

23 **A. I knew there were quite a few chemicals**
24 **determined from the carbon strip in that can.**

25 **Q.** If 2-ethyl-1-hexanol is the inert

1 ingredient for a residential insect spray, would
2 that not be important for a case agent in making a
3 determination during this investigation?

4 MS. POLK: Objection, Your Honor. Assumes
5 facts not in evidence.

6 THE COURT: Overruled.

7 You may answer that.

8 Q. BY MR. KELLY: Did you submit 356 to the
9 DPS crime lab?

10 A. I did.

11 Q. Did the DPS crime lab conduct an analysis
12 of the tarps and related materials in Exhibit 356?

13 A. They did.

14 Q. Did they provide to you a report on
15 February 4th, 2010?

16 A. I don't recall the day, but that sounds
17 right.

18 Q. Do you recall that my client was indicted
19 on February 3rd of 2010?

20 A. Again, I don't recall, but that sounds
21 right.

22 Q. Do you recall that the report from the
23 DPS crime lab was authored by Dawn Sy?

24 A. I do.

25 Q. And, again, take a look at

1 2-ethyl-1-hexanol. Are you aware that Ms. Sy
2 provided an analysis of Exhibit 356 and found trace
3 evidence of 2-ethyl-1-hexanol?

4 A. I know that there were quite a few
5 chemicals or, as she called it, "volatiles," that
6 were detected.

7 Q. Are you aware that 2-ethyl-1-hexanol's
8 possible use is as an inert ingredient for
9 residential insect spray?

10 A. No.

11 Q. Would that be an important fact for an
12 investigator in a case such as this?

13 A. I think it would be more important for
14 the -- the doctors and scientists. I don't know
15 what that is.

16 Q. Well, see, here's -- here's my question,
17 Detective: Yesterday you were willing to provide
18 opinions regarding organophosphates; correct?

19 A. Correct.

20 Q. You were willing to provide opinions
21 regarding volatiles; correct?

22 A. Correct.

23 Q. And you did not provide an opinion as to
24 the DPS crime lab result; correct?

25 A. No.

1 Q. And you not have not spoken with Dawn Sy
2 since the date of this incident in regards to this
3 incident; correct?

4 A. I was present for her defense interview.
5 But I don't know if -- I don't recall if I talked
6 to her directly.

7 Q. You indict Mr. Ray on February 3rd.
8 February 4th this lab report is authored by Ms. Sy.
9 And you never called her; correct?

10 A. I don't recall talking to Dawn Sy.

11 Q. We just covered this. You were the case
12 agent. You're responsible for the information
13 produced in this case. Agreed?

14 A. Agreed.

15 Q. It's your first homicide case in which
16 you've been assigned the case agent; correct?

17 A. Not technically. But --

18 Q. Well, you had a 1987 cold case.

19 A. Right.

20 Q. This is the first active homicide case
21 that you've been the case agent; correct?

22 A. Right.

23 Q. On December 14th, 2009, you made a
24 presentation to the medical examiners. And prior
25 to that presentation you didn't discuss anything

1 about the lab result with Ms. Sy?

2 MS. POLK: Your Honor, objection. Compound
3 question.

4 MR. KELLY: I'll -- I'll rephrase.

5 Q. On December 14th, 2009, you made a
6 presentation to, I think it was, 18 people from
7 four agencies, including medical examiners;
8 correct?

9 A. Correct.

10 Q. Prior to that presentation you had no
11 conversation with Ms. Sy; correct?

12 A. Correct.

13 Q. You did not tell those medical examiners,
14 the medical professionals that you just referred
15 to, that 2-ethyl-1-hexanol was present in
16 Exhibit 356; correct?

17 A. That is correct.

18 Q. Now, yesterday there was a litany of
19 questions about what Ms. Do and Mr. Li did during
20 interviews. Do you recall those?

21 A. Yes.

22 Q. If you charged me with a crime,
23 Detective Diskin, would you expect me to help you
24 in your investigation?

25 A. I guess it would depend if you had

1 **exculpatory information. Then it would be in your**
2 **benefit to assist me.**

3 **Q.** If you charged one of these juror members
4 with a crime and they hired me as their lawyer, is
5 it your testimony that I'm required to tell you
6 what your own evidence is?

7 **A. That's not what I said.**

8 **Q.** That's my question.

9 **A. You are not required to assist me with**
10 **the investigation against you.**

11 **Q.** And do you recall Ms. Do in June of 2010
12 asking you if you considered the possible cause of
13 death? And you said, yes? I believe it's heat
14 related?

15 **A. Yes.**

16 **Q.** That it might be carbon monoxide, but we
17 ruled that out; correct?

18 **A. Correct.**

19 **Q.** And it might be carbon dioxide, but we've
20 ruled that out; correct?

21 **A. No.**

22 **Q.** You didn't say that?

23 **A. No.**

24 **Q.** We can review your transcript in a
25 minute.

1 You never mentioned that there is a
2 possible residential inspect spray identified
3 within the sweat lodge on October 8th, 2009;
4 correct?

5 **A. Correct.**

6 **Q.** And that's your evidence; correct?

7 MS. POLK: Your Honor, objection to that prior
8 question. Assumes facts not in evidence. I would
9 ask that it be stricken and the answer be stricken.

10 THE COURT: Okay. It's -- technically as to
11 form -- I sustain it as to form.

12 **Q.** BY MR. KELLY: You're the case agent;
13 correct?

14 **A. Correct.**

15 **Q.** This information came on February 14th,
16 2010 -- or excuse me. February 4, 2010; correct?

17 **A. Correct.**

18 **Q.** This interview with Ms. Do occurred in
19 June of 2010; correct?

20 **A. Correct.**

21 **Q.** This evidence was in your possession;
22 correct?

23 **A. Are you talking about the lab report?**

24 **Q.** Yes, sir.

25 **A. Yes.**

1 **Q.** During that interview when were you asked
2 about the possible causes of death, you said, we
3 believe it's heat related; correct?

4 **A. I believe I said it's a combination of**
5 **extreme heat and also carbon dioxide.**

6 **Q.** And you said you ruled out carbon
7 monoxide; correct?

8 **A. I didn't. But the -- the medical**
9 **professionals did.**

10 **Q.** At no time did you mention
11 2-ethyl-1-hexanol during that interview?

12 **A. No, I didn't.**

13 **Q.** It's your evidence is my point; correct?

14 **A. Correct.**

15 **Q.** Now, you mentioned that's a -- graduated,
16 I think, from either Mayer or Bradshaw High School?

17 **A. Mayer.**

18 **Q.** And went to Stanislaus. You ever heard
19 that pi x r squared equals the area of a circle?

20 **A. Yes.**

21 **Q.** And this sweat lodge was approximately 23
22 feet in diameter; correct?

23 **A. Correct.**

24 **Q.** Thus, the radius would be 11.5; correct?

25 **A. Yes.**

1 **Q.** 11.5 times 11.5 is the radius squared;
2 correct?

3 **A. Yes.**

4 **Q.** Pi is approximately 3.14; correct?

5 **A. Right.**

6 **Q.** So for the sweat lodge the approximate
7 area is 415 square feet; correct?

8 **A. Correct.**

9 **Q.** In front of you you have 356. This is
10 359, this is 357, and this is 358.

11 What I'm going to ask you to do,
12 Detective, is put this can right at the end of the
13 tape, if you would, sir. You have to bring it
14 right up to the edge.

15 Okay. Right here my notebook is 11 1/2
16 feet. Could you set that can there?

17 Go ahead and let me -- even with this.

18 **A. Where do you want the can?**

19 **Q.** Right where the end of your tape was
20 approximately.

21 Now, if you'd step down. Let's put --
22 that's 356. Let's put 357 on the bar in front of
23 the jury.

24 THE COURT: Mr. Kelly, would you check the
25 exhibit numbers just so we have the record clear.

1 MR. KELLY: Thank you, Judge. And I did
2 misstate the exhibit numbers. I don't know what
3 they are. They're evidence items that I've been
4 referring to.
5 May I take a minute?
6 THE COURT: Yes.
7 MR. KELLY: Thank you, Judge.
8 THE COURT: Let the clerk write it down.
9 MR. KELLY: Judge, so I can correct the
10 record, at the witness stand is 902 --
11 THE COURT: Okay.
12 MR. KELLY: -- which was evidence item 356.
13 MS. POLK: Your Honor, I'm confused about the
14 exhibit numbers.
15 MR. KELLY: 902.
16 THE COURT: This was 902 at the front.
17 Correct, Mr. Kelly?
18 MR. KELLY: That's correct. 901 is in front
19 of jury. And that's evidence item number collected
20 on that day, 357.
21 Q. Now, Detective, take my chair and go
22 11 1/2 feet that way. What exhibit is that?
23 A. **This is -- this is 899.**
24 Q. Exhibit 899 is 11 1/2 feet away from the
25 podium. Now, one more. And I appreciate your

1 help. This is Exhibit 900. And we'll have to set
2 it up kind of high so the jury can see it.
3 Now you can take your seat.
4 Detective, what I attempted to visualize
5 here is four items of evidence that you seized on
6 October 8th, 2009; correct?
7 A. **Correct.**
8 Q. The sweat lodge is approximately 23 feet
9 in diameter; correct?
10 A. **Correct.**
11 Q. And, of course, it's a sweat lodge. It's
12 not an automobile. So those measurements are not
13 precise; correct?
14 A. **Correct.**
15 Q. They're approximate; correct?
16 A. **Yes.**
17 Q. And you took -- I believe you told us
18 yesterday on that north/south and directions of a
19 clock diagram, you took four separate samples out
20 of that sweat lodge. Correct?
21 A. **Correct.**
22 Q. And this math indicates that $p \times$
23 r squared, which would be the approximate area of
24 this circle, is 415 square feet; correct?
25 A. **Correct.**

1 Q. Out of that 415 square feet, you took
2 four one-foot sections; correct?
3 A. **I think they were ten inches.**
4 Q. Okay. Let's call them a foot.
5 A. **Okay.**
6 Q. Easy math for the jury.
7 Four one-foot sections; correct?
8 A. **Correct.**
9 Q. So on a very simple mathematical
10 calculation, you took approximately 1 percent of
11 the area of the sweat lodge; correct?
12 A. **Correct.**
13 Q. Four feet out of approximately 415;
14 correct?
15 A. **Correct.**
16 Q. And actually it's less than 1 percent
17 because, as you corrected me, those are about ten
18 inches. And I'm not going to do the calculus. But
19 it's not a flat 23-foot circle. It had a four- or
20 five-foot height to it. It was in the form of a
21 dome.
22 A. **Right.**
23 Q. So it would be more than 415; correct?
24 A. **Quite a bit -- quite a bit more.**
25 Q. And I think Mr. Li said around 500 square

1 feet, something more than 415?
2 A. **Correct.**
3 Q. So then you would agree with me that you
4 sampled less than 1 percent of the total area of
5 the tarp, and one of those cans showed the presence
6 of 2-ethyl-1-hexanol; correct?
7 A. **I -- I assume so. I'm not looking at the**
8 **lab report. I actually think I have it with me.**
9 Q. Well, for this -- for this proceeding
10 it's State's Exhibit 345. So let me hand that to
11 you.
12 In front of you is State's Exhibit 345;
13 correct?
14 A. **Correct.**
15 Q. And that's the Arizona Department of
16 Public Safety scientific examination report
17 authored by Dawn Sy, dated February 4, 2010;
18 correct?
19 A. **Correct.**
20 Q. If you take a look at page 2, does that
21 refresh your recollection?
22 A. **It does.**
23 Q. Trace amounts of 2-ethyl-1-hexanol?
24 A. **Yes.**
25 MR. KELLY: Your Honor, I'd move for admission

1 of 345.

2 THE COURT: Ms. Polk.

3 MS. POLK: Your Honor, this is a witness who
4 will be testifying in the trial. The state would
5 object. This witness has no foundation for this
6 exhibit.

7 THE COURT: Do you anticipate having a witness
8 who will provide it?

9 MS. POLK: I do, Your Honor. But it is more
10 appropriate to admit that through a witness who can
11 discuss what these items mean instead of have a
12 detective talk about the scientific report.

13 THE COURT: It's going to be admitted
14 conditionally with the understanding there be later
15 foundation.

16 (Exhibit 345 admitted.)

17 MR. KELLY: May I publish?

18 THE COURT: Yes.

19 Q. BY MR. KELLY: And, Detective, just so
20 the jury can see what we're talking about -- and
21 I'm going to hand it back to you in case it's
22 easier to read.

23 I think Ms. Do is going to put up 345.

24 And turn to page 2.

25 And that scientific examination report

1 we've been discussing for the last ten minutes or
2 so indicates trace amounts of 2-ethyl-1-hexanol;
3 correct?

4 A. Yes.

5 Q. And then also 2-ethylhexanol; correct?

6 A. Correct.

7 Q. And then indicated some presence of some
8 volatiles; correct?

9 A. Correct.

10 Q. Now, what's interesting is the lab report
11 indicates that this came from item 356, which is
12 902 in front of you; correct?

13 A. That's correct.

14 Q. Pretty important fact in an
15 investigation, isn't it?

16 A. I don't know the importance.

17 Q. Well, let's back up. You said that you
18 were born and raised in Yavapai County?

19 A. Yes.

20 Q. And went to Mayer High School?

21 A. Right.

22 Q. Played baseball for Stanislaus College?

23 A. Actually, it was College of the
24 Siskiyous.

25 Q. College of the Siskiyous.

1 Came back, went to NARDA, became
2 certified as a police officer; correct?

3 A. Correct.

4 Q. And focused on -- or became a detective,
5 I think it was, in 2006; correct?

6 A. Correct.

7 Q. And you were primarily assigned cases
8 involving child victims; correct?

9 A. Correct.

10 Q. Ms. Polk went through your training and
11 education up to 2009; correct?

12 A. Correct.

13 Q. And it indicates that in January '06 you
14 went to two child investigation conferences, in
15 July of 2006 went to another child abuse and
16 exploitation conference, November of '06 advanced
17 forensic interview --

18 MS. POLK: Excuse me, Mr. Kelly. Can the
19 exhibit be removed if there's not going to be a
20 line of questioning.

21 THE COURT: Yes. Please remove the exhibit.

22 MR. KELLY: Thank you.

23 MS. POLK: Thank you, Your Honor.

24 Q. BY MR. KELLY: You went to an advanced
25 forensic interview training of children who allege

1 abuse; correct?

2 A. Correct.

3 Q. And in January of '08 the 19th child
4 abuse prevention conference; correct?

5 A. Correct.

6 Q. Then -- and I'm only talking about the
7 time period between your detective promotion in
8 January of '06 until this case of October of '09.
9 Okay?

10 A. Okay.

11 Q. And then in October of 2008, you went to
12 the Arizona homicide investigators annual
13 conference in Las Vegas; correct?

14 A. That's correct.

15 Q. And that was one week in length; correct?

16 A. Correct.

17 Q. And what happens at those conferences is
18 training; correct?

19 A. Correct.

20 Q. And the training involves how to collect
21 and preserve evidence; correct?

22 A. I don't think this one -- this particular
23 one did. The homicide investigators association
24 conference is usually more case studies where
25 detectives from major cases -- like when I was

1 **there, we had the Amish school shootings. The**
 2 **detective that handled that case came, and they go**
 3 **through the case and what they learned in that**
 4 **case.**

5 **Q.** And in those case studies do they discuss
 6 the importance of the proper collecting and
 7 preservation and testing of evidence?

8 **A. I know the -- the importance of -- of the**
 9 **proper preservation of evidence. But I don't think**
 10 **that at that conference we discussed that.**

11 **Q.** And the reason it's proper is because it
 12 may provide the answer to a jury in a jury trial
 13 someday as to a contested issue; correct?

14 **A. Correct.**

15 **Q.** And by the way, Detective, you don't work
 16 for Ms. Polk; correct?

17 **A. Correct.**

18 **Q.** You work for our sheriff, Steve Waugh?

19 **A. Correct.**

20 **Q.** Two separate agencies in Yavapai County;
 21 correct?

22 **A. Yes.**

23 **Q.** Both elected officials, but you are a
 24 certified police officer; correct?

25 **A. Correct.**

1 **Q.** Your job is to protect and serve we hear
 2 so many times; correct?

3 **A. Correct.**

4 **Q.** And when elevated to the position of
 5 detective, you knew that your job as a patrol
 6 deputy was going to change and you were going to
 7 start conducting investigations; correct?

8 **A. Changed to some extent. As a patrol**
 9 **deputy, I conducted investigations but not**
 10 **exclusively.**

11 **Q.** And maybe I misstated this. You learned
 12 at NARDA, the regional training academy sponsored
 13 through Yavapai College, the importance of
 14 collecting and preserving evidence; correct?

15 **A. Correct.**

16 **Q.** And then after the homicide conference,
 17 you went to a buried body recovery school, which, I
 18 assume, is related to homicides primarily; correct?

19 **A. Correct.**

20 **Q.** A basic shooting reconstruction school;
 21 correct?

22 **A. Correct.**

23 **Q.** And a criminal investigations using
 24 cellular technologies; correct?

25 **A. Correct.**

1 **Q.** In January of 2006 you were assigned at
 2 Yavapai County Sheriff's Office to a specific unit
 3 called the "Crimes Against Children"; correct?

4 **A. Correct.**

5 **Q.** And that's still your assignment;
 6 correct?

7 **A. Correct.**

8 **Q.** Now, when we talk about a homicide
 9 investigation, would you agree with me that it's
 10 important not to jump to conclusions?

11 **A. Correct.**

12 **Q.** Would you agree that here you are, you're
 13 a police officer, not working for the prosecutor,
 14 that you should determine facts objectively;
 15 correct?

16 **A. Correct.**

17 **Q.** Fairly?

18 **A. Correct.**

19 **Q.** Impartially?

20 **A. Correct.**

21 **Q.** And the reason is because we don't want
 22 any -- any false accusations; correct?

23 **A. Correct.**

24 **Q.** And that's happened; right?

25 **A. Not in this case.**

1 **Q.** No. I'm talking about in -- in the --
 2 are you saying you're that confident?

3 **A. Yes.**

4 **Q.** Okay. We'll talk about that.

5 **A. All right.**

6 **Q.** And you're confident because by the end
 7 of October 9th, 2009, you developed your belief
 8 that you've discussed; correct?

9 **A. October 9, 2009, I didn't know what had**
 10 **happened.**

11 **Q.** That's what you told Ms. Do in June 2010.

12 **A. Well, we -- it's a sweat lodge. So --**
 13 **you know -- we suspected that it could be heat, but**
 14 **we didn't know what else caused it.**

15 **Q.** And you didn't know about
 16 2-ethyl-1-hexanol, did you?

17 **A. No, I didn't.**

18 **Q.** And -- you know -- I asked you a
 19 question. You believe that people sometimes are
 20 wrongfully -- because facts are not determined
 21 objectively or impartially or fairly, wrongfully
 22 accused of criminal conduct?

23 **MS. POLK:** Your Honor, compound question.

24 **THE COURT:** If you can answer that, you may.

25 **THE WITNESS:** I can. I know that it happens

1 where people are wrongfully accused for a variety
2 of reasons.

3 **Q.** BY MR. KELLY: Sure. I -- you know -- I
4 think of an example like the Atlanta bomber, the
5 Olympic bomber. Do you recall that case?

6 **A.** I do.

7 **Q.** A guy named Richard Jewell was a security
8 guard who found a pipe bomb, and they accused him
9 of a crime that destroyed his life. Do you
10 recall --

11 **A.** Yes.

12 **Q.** -- anything on it?

13 He lost everything, every dime that he
14 owned. And then they found --

15 MS. POLK: Your Honor, objection.

16 MR. KELLY: Can I finish?

17 THE COURT: Sustained.

18 **Q.** BY MR. KELLY: As a result of a wrongful
19 accusation, a person -- the mere fact of an
20 indictment can ruin a person's life. Fair
21 statement?

22 MS. POLK: Your Honor, calls for a conclusion.
23 This is not appropriate for this witness.

24 THE COURT: Sustained.

25 **Q.** BY MR. KELLY: You told us that you know

1 of people who have been wrongfully accused of
2 crimes; correct?

3 **A.** I don't know of -- I'm not thinking of
4 any. But I'm sure that there have been through
5 history people that were wrongly accused of crimes.

6 **Q.** Well, I recall a case I had last year,
7 State v. Solomon, who was acquitted of 19 counts --

8 MS. POLK: Judge, argumentative.

9 THE COURT: Sustained.

10 **Q.** BY MR. KELLY: Are you saying -- let me
11 phrase it this way: The Yavapai County Sheriff's
12 Office is never wrong?

13 MS. POLK: Judge, argumentative.

14 THE COURT: Overruled.

15 You may answer that.

16 THE WITNESS: I would never say that we're
17 never wrong.

18 **Q.** BY MR. KELLY: Okay. Are you saying that
19 a guy who has three generations in Yavapai County
20 and played baseball with a sore shoulder can't be
21 wrong?

22 **A.** I am fully capable of being wrong.

23 **Q.** And the reason I ask that question is
24 because I was wondering what relevance that has at
25 all in this case that you played baseball.

1 **A.** I just answer the questions I'm asked.

2 **Q.** Okay. And the question I'm asking you
3 is, the 2-ethyl-1-hexanol was not identified by you
4 during this investigation; correct?

5 **A.** Correct.

6 THE COURT: Mr. Kelly, we're going to take a
7 morning recess. Let's do that at this time.

8 Ladies and gentlemen, please be
9 reassembled in ten minutes, at a quarter after.

10 Detective, you are excused at this time
11 also for that brief recess. And of course,
12 remember the admonition.

13 Thank you.

14 (Recess.)

15 THE COURT: Record will show the presence of
16 Mr. Ray, the attorneys, the jury. Detective Diskin
17 is on the witness stand.

18 Mr. Kelly, you may continue.

19 MR. KELLY: Thank you, Judge.

20 **Q.** Detective, we spoke a little bit about
21 your training and experience as a police officer.
22 And in addition to that summary you provided, I
23 would image that you have a lot of support from
24 your agency itself?

25 **A.** Correct.

1 **Q.** You have a detective sergeant,
2 supervisor; correct?

3 **A.** Correct.

4 **Q.** Lieutenants, commanders; correct?

5 **A.** Correct.

6 **Q.** Resources that are available -- if you
7 have any need or any question, you have someone to
8 go to; correct?

9 **A.** Correct.

10 **Q.** In addition to that, in addition to the
11 resources available -- let me stop.

12 In addition to those folks above you --
13 the detectives, sergeants, and lieutenants, the
14 commanders, and other detectives -- you also have
15 evidence technicians; correct?

16 **A.** Correct.

17 **Q.** And you mentioned Josh Nelson; correct?

18 **A.** Correct.

19 **Q.** And there is a fellow, Ken Brewer?

20 **A.** Correct.

21 **Q.** What does Mr. Brewer do?

22 **A.** He's an evidence technician. Josh Nelson
23 is the supervisor of that unit. And there's --
24 there's different evidence technicians.

25 **Q.** And so my point is, is within the agency,

1 Yavapai County Sheriff's Office, it's quite a large
 2 agency these days; correct?
 3 **A. Yeah. I guess.**
 4 **Q.** I mean, compared to when you and I were
 5 growing up in Yavapai County?
 6 **A. Yes.**
 7 **Q.** And it has a lot of resources available
 8 to help you during an investigation; correct?
 9 **A. Correct.**
 10 **Q.** Now, in addition to the Yavapai County
 11 Sheriff's Office, you also have at your disposal or
 12 available for use, the Arizona Department of Public
 13 Safety crime labs; correct?
 14 **A. Correct.**
 15 **Q.** And it's typical for an investigating
 16 agency like Yavapai County to gather evidence and
 17 submit it to the crime lab; correct?
 18 **A. Correct.**
 19 **Q.** And I think there are three crime labs --
 20 Flagstaff, Phoenix, and Tucson; correct?
 21 **A. Correct.**
 22 **Q.** And you usually -- I think you said,
 23 every Wednesday someone takes evidence up to
 24 Flagstaff, and then the crime lab determines the
 25 next step in analysis; correct?

1 **A. Correct.**
 2 **Q.** So we have Yavapai County Sheriff's
 3 Office, the Arizona Department of Public Safety
 4 crime labs. And then also many times in an
 5 investigation do you not have joint investigations
 6 with other law enforcement agencies?
 7 **A. Correct.**
 8 **Q.** In other words, if you're in the
 9 proximity of Prescott, you may also be able to use
 10 the resources of Prescott PD, as well as Yavapai
 11 County if it's a joint investigation. True?
 12 **A. Correct.**
 13 **Q.** And in this particular case, did you at
 14 any time use Sedona Police Department in any
 15 regard?
 16 **A. No.**
 17 **Q.** In addition to those other state
 18 agencies, if necessary you can also access the FBI;
 19 correct?
 20 **A. Yes.**
 21 **Q.** And use of some of their resources;
 22 correct?
 23 **A. Yes.**
 24 **Q.** And then finally, of course, you're not
 25 limited to public entities. If -- if Yavapai

1 County Sheriff's Office needs to, it can also
 2 access private entities such as private
 3 laboratories; correct?
 4 **A. Correct.**
 5 **Q.** So have I missed anything?
 6 **A. That pretty much covers it.**
 7 **Q.** Okay. And my point is simply that we
 8 wouldn't want to imply to this jury that somehow
 9 you were shorthanded. You had available resources
 10 that you could rely on during your investigation;
 11 correct?
 12 **A. Correct.**
 13 **Q.** And something else that I wanted to point
 14 out is you kept referencing that yellow tape as
 15 crime-scene tape. Do you recall that?
 16 **A. Yes.**
 17 **Q.** That tape actually says something like,
 18 Yavapai County Sheriff's Office Investigation? Do
 19 Not Cross? What does it say? Tell me.
 20 **A. I believe it says Sheriff's Line. Do Not**
 21 **Cross.**
 22 **Q.** Sheriff's Line, Do Not Cross. And that
 23 stuff is put up anytime you or fellow detective
 24 or -- or deputy needs to conduct an investigation;
 25 correct?

1 **A. No.**
 2 **Q.** Well, anytime you're attempting to
 3 preserve an area to conduct an investigation of
 4 some type, you can use that tape to cordon it off;
 5 correct?
 6 **A. Yes. The tape is to mark the perimeter**
 7 **of the -- the -- the crime scene.**
 8 **Q.** Keep people out; correct?
 9 **A. Correct.**
 10 **Q.** And -- you know -- I heard some questions
 11 yesterday about arson investigations. How many
 12 arson investigations have you done?
 13 **A. None.**
 14 **Q.** How many -- have you ever helped anybody
 15 do an arson investigation?
 16 **A. I don't think so.**
 17 **Q.** Would you be surprised to learn that in
 18 an arson investigation that the area of the burning
 19 house, as the example used by Ms. Polk, that scene
 20 tape is put around the house?
 21 **A. I would think it would be put around the**
 22 **whole property because you're probably trying to**
 23 **preserve footprints of possible suspects --**
 24 **Q.** Sure.
 25 **A. -- and things like that.**

1 Q. So once it is -- the area is cordoned off
 2 with the yellow tape, then investigators can go in
 3 and conduct an investigation; right?
 4 A. Correct.
 5 Q. And that investigation can include
 6 bringing in experts; correct?
 7 A. Correct.
 8 Q. In other words, in an arson
 9 investigation, a -- an accelerant detection dog
 10 could be brought in; correct?
 11 A. I've never heard of an accelerant
 12 detection dog. But I would assume if you were
 13 doing an arson investigation, you would have an
 14 arson investigator there.
 15 Q. The ones I've done, they're probably
 16 referred to as arson "dogs," but their handlers
 17 tell me they're accelerant detection dogs.
 18 You can bring in a K-9 to determine the
 19 presence of an accelerant; correct?
 20 A. I'll take your word for it.
 21 Q. Okay. You can bring in an expert, like
 22 an arson expert from a fire department, to
 23 determine burn patterns; correct?
 24 A. Correct.
 25 Q. You can bring in an electrical engineer

1 to determine whether or not the cause of the fire
 2 was related to electrical malfunction; correct?
 3 A. Correct.
 4 Q. And then -- in order to do that, as well
 5 as, like, a footprint, guy from DPS crime lab. I
 6 think you brought that up; correct?
 7 A. Correct.
 8 Q. And in order to do that, that tape could
 9 remain on that scene not for hours, but for days;
 10 correct?
 11 A. Correct.
 12 Q. So it's somewhat misleading to imply to
 13 this jury that somehow you have to pick up the
 14 ashes of the house and take it to the DPS -- to Ken
 15 Brewer and say, here. Save these ashes.
 16 You have the ability to block that off so
 17 nobody can access it; correct?
 18 A. Correct.
 19 Q. And in this case that tape was removed on
 20 October 9 in the evening; correct?
 21 A. Correct.
 22 Q. I think about 8:00 o'clock in the
 23 evening?
 24 A. Give or take. I think I left the -- I
 25 had left the crime scene at 8:30. So it would have

1 been right around 8:30 when we took down the crime
 2 tape.
 3 Q. And as you're in there investigating the
 4 scene, all those resources we discussed were
 5 available if you would have requested it?
 6 A. Correct.
 7 Q. Now, once you begin your investigation,
 8 you're not -- you're required by Sheriff Waugh to
 9 prepare police reports; correct?
 10 A. Correct.
 11 Q. And every agency, but at least the
 12 Yavapai County Sheriff's Office, has a policy in
 13 regards to when and how those police reports are
 14 prepared; correct?
 15 A. Correct.
 16 Q. And correct me if I'm wrong, that a
 17 police report should be an objective
 18 memorialization of what you observed. Correct?
 19 A. Correct.
 20 Q. And it should include material facts --
 21 important facts to your investigation; correct?
 22 A. Correct.
 23 Q. And sometimes I've noticed in police
 24 reports if there's a quotation from a particular
 25 individual, it would be included in quotation

1 marks; correct?
 2 A. Correct.
 3 Q. And the purpose of those police reports
 4 is that given the number of investigations that you
 5 do, if you need to go back and rely on an important
 6 fact, that police report helps you jog your memory;
 7 correct?
 8 A. Correct.
 9 Q. So it's important that you include
 10 material facts? It's important that you include
 11 facts which are material or relevant or important
 12 to your investigation; correct?
 13 A. Correct.
 14 Q. In other words, you wouldn't want to
 15 leave out something important because if 18 months
 16 later you had to remember it, it wouldn't exist.
 17 It would be hard to remember. Correct?
 18 A. Correct.
 19 Q. And, of course, you did that in this
 20 case?
 21 A. I believe so.
 22 Q. Now, we heard in -- when you were
 23 interviewing the witnesses that you described, to
 24 the extent possible those witness interviews are
 25 tape-recorded; correct?

1 **A. Correct.**
 2 **Q.** And the reason is, then, is that if you
 3 need to refer to what was said on a later date, you
 4 have the actual statement versus what might be in a
 5 police report; correct?
 6 **A. Correct.**
 7 **Q.** So it's better to have an interview than
 8 not; correct?
 9 **A. You mean a recording?**
 10 **Q.** Thank you. A recorded interview or
 11 not --
 12 **A. Yes.**
 13 **Q.** -- versus not having one; correct?
 14 **A. Correct.**
 15 **Q.** When you interview a witness, you
 16 understand that a witness's perception, the ability
 17 to perceive the event, is important; correct?
 18 **A. Correct.**
 19 **Q.** So let me give you an example. We've
 20 got -- you were present during the entire trial;
 21 correct?
 22 **A. Correct. Most of it.**
 23 **Q.** And when I talk about perception, when
 24 you're interviewing Fawn Foster back in October
 25 of 2009, she provided you a recollection as to what

1 happened; correct?
 2 **A. Correct.**
 3 **Q.** During that interview did you consider
 4 her ability to perceive what was happening?
 5 **A. I asked her what happened, and she told**
 6 **me what she witnessed.**
 7 **Q.** Let me -- let me be a little simpler. We
 8 know we had 11 1/2 feet here. And you recall with
 9 Ms. Foster -- if we're close, we have 23 feet here;
 10 correct?
 11 **A. Correct.**
 12 **Q.** And she told us that she was about 30
 13 feet away from the individuals that she provided an
 14 opinion as to what they said. Do you recall that?
 15 **MS. POLK:** Your Honor, objection. Misstates
 16 the testimony of Fawn Foster.
 17 **THE COURT:** Ladies and gentlemen, you have to
 18 go with your recollection of the evidence as to the
 19 accuracy and of the posed question at this point.
 20 So, Detective, if you can answer that
 21 question, if the premise is correct, in your view,
 22 you may do that. If you can't, you can state that
 23 you cannot.
 24 **Q.** BY MR. KELLY: Let me rephrase.
 25 Detective, do you recall me coming back here,

1 asking a question, Ms. Foster was sitting on a log
 2 and -- and how she could hear things in the sweat
 3 lodge?
 4 **A. I do. Yes.**
 5 **Q.** Okay. Here's my point: During these
 6 interviews, is the witness's perception to you as
 7 the investigating detective --
 8 **A. What they hear is important.**
 9 **Q.** Okay. But like that simple example,
 10 whether they're 30 feet away or 3 feet away, do you
 11 take that into account?
 12 **A. You mean as to whether or not I believe**
 13 **them that they heard what they say that they heard?**
 14 **Q.** Well, you know. "Believe" is a different
 15 word. I'm talking about how you assess the
 16 validity of statements.
 17 **A. If somebody tells me what they heard and**
 18 **saw, then that's documented. And if that matches**
 19 **the other witness statement and the facts in the**
 20 **case, which it did with Ms. Foster, then we would**
 21 **believe that she's telling the truth.**
 22 **Q.** Hold on. Hold on. Detective Diskin, do
 23 you understand the difference between -- have you
 24 ever studied the scientific method?
 25 **A. No.**

1 **Q.** To refresh your recollection from high
 2 school, that's where you make, like, a hypotheses
 3 or deduction and gather facts. And then based on
 4 education, training, and experience, you develop
 5 ultimately a conclusion, and then you have some
 6 degree of validity.
 7 Have you heard that?
 8 **A. Yes.**
 9 **Q.** That's much different than a belief;
 10 correct?
 11 **A. I don't know.**
 12 **Q.** Would you agree with this: This jury,
 13 the facts that they're going to decide, are the
 14 facts that come from this witness stand?
 15 **A. Correct.**
 16 **Q.** And when Fawn Foster testified, she
 17 testified about what she heard; correct?
 18 **A. Correct.**
 19 **Q.** And Amayra Hamilton testified; correct?
 20 **A. Correct.**
 21 **Q.** And Dr. Wagoner testified; correct?
 22 **A. Correct.**
 23 **Q.** Et cetera. All of them; correct?
 24 **A. Correct.**
 25 **Q.** Those are the facts; right?

1 **A. Yes.**
 2 **Q.** Now, my question is real simple, is it
 3 was during your investigation of these folks, do
 4 you consider the witness's ability to perceive the
 5 event? Simple question.
 6 **A. If it's relevant. For instance, if**
 7 **somebody was a hundred yards away and said that**
 8 **they heard a casual conversation going on, then we**
 9 **would assume that they're not telling the truth**
 10 **because you couldn't hear that far away.**
 11 **Q.** Well -- and -- and see. That's where you
 12 and I differ. I don't know that that person's not
 13 telling the truth. I'm just asking you. You got
 14 to consider that in rendering a decision one way or
 15 the other; correct?
 16 **A. Sure.**
 17 **Q.** And when you consider one of these
 18 interviews -- or when you're taking an interview,
 19 do you consider a person's possible motive or bias
 20 they may have?
 21 **A. Yes.**
 22 **Q.** Would that include whether or not they've
 23 sued someone, they have a financial motive?
 24 MS. POLK: Your Honor, this is all
 25 speculative.

1 THE COURT: Overruled.
 2 You can answer that if you can.
 3 THE WITNESS: Yes. If there's a lawsuit, it
 4 could effect somebody's bias.
 5 **Q.** BY MR. KELLY: Or if they were a
 6 defendant in a lawsuit; correct?
 7 **A. Correct.**
 8 **Q.** And there may be other biases or motives,
 9 such as a husband or wife may have an inherent bias
 10 in their -- in their statements; correct?
 11 **A. Correct.**
 12 **Q.** Do you consider -- let me just ask you.
 13 As an investigator, when you're considering these
 14 facts, what do you do with the statement like, Fawn
 15 Foster is very good at speaking to animals. Where
 16 do you put that in the spectrum?
 17 **A. I really don't know how to answer that.**
 18 **Q.** And I -- and I understand that. I mean,
 19 it was a first for me in my life. But --
 20 **A. I need to learn that before deer season.**
 21 **Q.** I agree.
 22 You've lived in Yavapai County your
 23 entire life; correct?
 24 **A. Correct.**
 25 **Q.** And you know that there are insects in

1 Yavapai County; correct?
 2 **A. Correct.**
 3 **Q.** And you know that insects are close to
 4 water, like Oak Creek; correct?
 5 **A. Sure.**
 6 **Q.** And you know that there are mammals, such
 7 as mice and rats; correct?
 8 **A. Correct.**
 9 **Q.** And you've had those problems at your
 10 home; correct?
 11 **A. I've use quite a bit of weed spray and**
 12 **bug spray. So I -- I use quite a bit of poison.**
 13 **So I don't have any problem.**
 14 **Q.** And so the question is, in terms of your
 15 investigation, do you take into account a person's
 16 statement that they control the insects and the
 17 mammals, the rats on their property, by telling
 18 them, hey, go away, versus using some other method
 19 of control?
 20 **A. Sure. I guess -- I mean, they said**
 21 **they've talked to the rats and the rats kept coming**
 22 **back, so they had to get some poison.**
 23 **Q.** And let's put up Exhibit 141. And I want
 24 to talk about another principal, kind of witness
 25 interrogation.

1 If we can blow up the sweat lodge.
 2 Now, do you see the Dream Team members
 3 around the sweat lodge?
 4 **A. I do.**
 5 **Q.** And do you recall the testimony that
 6 this -- I think, if I'm not trying to misstate
 7 anything, my understanding is Ms. Hamilton said she
 8 took this photograph after the sweat lodge had
 9 started.
 10 **A. Correct.**
 11 **Q.** And if you look, it appears the Dream
 12 Team is around the sweat lodge and it's closed;
 13 correct?
 14 **A. I can't tell if it's closed. I would**
 15 **assume so because only the Dream Team is outside.**
 16 **Q.** Right. So my point is that you recall
 17 some testimony along the lines of, I walked away
 18 from the sweat lodge and took this photograph after
 19 the beginning of the sweat lodge --
 20 **A. Correct.**
 21 **Q.** -- ceremony; correct?
 22 **A. Yes.**
 23 **Q.** Now, do you recall the testimony of Fawn
 24 Foster that she sat on the log the whole time
 25 except when she helped Lou Caci?

1 MS. POLK: Your Honor, again, misstates the
2 testimony of Ms. Foster.

3 MR. KELLY: I don't think it does.

4 THE COURT: Once again, ladies and gentlemen,
5 you have your recollection that you need to rely on
6 with regard to the accuracy of the premise of the
7 question.

8 And, Detective, if you're able to answer
9 that question, you can. If you're not, then you
10 can state that.

11 THE WITNESS: I can tell you what I remember
12 about her testimony.

13 Q. BY MR. KELLY: Remember her talking about
14 sitting on the log that we tried to exemplify?

15 A. **I remember her discussing hearing and
16 seeing things while sitting on a log.**

17 Q. Right. And she said, I sat on that log,
18 and I was there the whole time except, during
19 cross-examination, when she went to get the ice
20 water for Lou Caci's arm.

21 Do you recall that discussion?

22 MS. POLK: Objection. Misstates the
23 testimony.

24 THE COURT: It's a question.

25 Can you answer that? If you can --

1 THE WITNESS: It was my interpretation of her
2 testimony that most of the time she was down by the
3 sweat lodge, she was sitting on the log.

4 Q. BY MR. KELLY: Right. And the only time
5 she left was to get the ice water?

6 A. **I don't remember that. I remember her
7 helping Lou Caci.**

8 Q. This jury is going to decide what the
9 facts are in this case, not you or I. But as to --
10 as it relates to Ms. Foster.

11 I want to point out in 141, you see
12 Ms. Foster walking away from the sweat lodge?

13 A. **I see a person walking away from the golf
14 cart it looks like. Could you zoom out one more
15 time so I can see where this is.**

16 Q. Pardon me? I didn't hear you.

17 A. **No. I just wanted to --**

18 Q. Okay. There was another exhibit where
19 Fawn Foster was identified as the lady with the
20 blue shirt and the ball cap and, I believe, was
21 walking in front of the aid station.

22 Do you recall that?

23 A. **Right. That was when the participants
24 were entering the sweat lodge.**

25 Q. Lined up. Correct.

1 And this -- would you agree with me that
2 person appears to be somewhat identical there in
3 the photograph?

4 A. **It very well could be. If we could throw
5 up that photograph.**

6 Q. So here's -- here's my question. You
7 know, I would. I just don't remember the number
8 offhand. Maybe 131, Detective. It's the one where
9 everyone is lined up going in.

10 A. **Yeah.**

11 Q. I just don't have it.

12 THE COURT: What number is this?

13 MR. KELLY: It's 144.

14 THE WITNESS: Yes.

15 Q. BY MR. KELLY: Now, see the person in the
16 foreground in 144 identified by Fawn and several
17 other witnesses as Fawn Foster?

18 A. **Yes.**

19 Q. Now, let's take a look at 141. Kind of
20 appears to be the same person; correct?

21 A. **I would think so.**

22 Q. Here's my question: In addition to their
23 perception, when you're evaluating these witnesses,
24 do you consider inconsistencies?

25 A. **Sure.**

1 Q. So if it were inconsistent that she said,
2 I sat by the sweat lodge the whole time, and
3 Exhibit 141 shows her leaving, you would consider
4 that?

5 A. **Sure.**

6 MR. KELLY: Judge, there's a stipulation to
7 admit 505.

8 THE COURT: 505 is admitted.

9 (Exhibit 505 admitted.)

10 MR. KELLY: Perhaps we can publish it to the
11 jury?

12 THE COURT: Yes.

13 MR. KELLY: May I approach the witness?

14 THE COURT: Yes.

15 Q. BY MR. KELLY: This is a photograph
16 taken -- the scene tape is up, so I assume
17 October 9th during your investigation?

18 A. **That would be consistent. Yes.**

19 Q. And we talked about collecting and
20 preserving evidence; correct?

21 A. **Correct.**

22 Q. And you said, well, I took samples out of
23 the coolers that had electrolyte and lemon water?

24 A. **Correct.**

25 Q. You kept the bottles of water that you

1 saw; correct?

2 **A. Correct.**

3 **Q.** None of that was ever tested, was it?

4 **A. No.**

5 **Q.** And I notice in 505 -- I notice in 505

6 a -- a water pitcher. Do you see that?

7 **A. I do.**

8 **Q.** Behind the cooler; correct?

9 **A. I do.**

10 **Q.** You didn't take a sample of that?

11 **A. I think we did. I'd have to look at --**

12 **can I look at my evidence logs?**

13 **Q.** And so the jury -- thank you -- knows,

14 I'm talking about this -- this pitcher.

15 **A. Yeah. One -- one of the pitchers -- or**

16 **one of the coolers was electrolyte water. One was**

17 **regular water. And I think that what they were**

18 **calling the lemon water was in that -- that small**

19 **pitcher.**

20 **Q.** But you don't know?

21 **A. I don't remember. No.**

22 **Q.** Now, you told us on direct examination

23 that you gathered information from some interviews

24 from both the Mercers on October 9, 2009; correct?

25 **A. Correct.**

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1 **Q.** When you showed up at 8:30 in the morning

2 on October 9, were you briefed?

3 **A. No.**

4 **Q.** How did you find out what happened during

5 the investigation on October 8?

6 **A. When I first got there, there was no**

7 **other detectives there or volunteers were there.**

8 **And then between 8:30 when I arrived and when I**

9 **interviewed the Mercers, a couple of detectives had**

10 **arrived. Sergeant Winslow had arrived and had**

11 **briefed me on what had happened the night before.**

12 **Q.** And that's what I was going to ask you.

13 At some point in time you were aware that police

14 officers, not volunteers, but police officers, had

15 conducted interviews on October 8; correct?

16 **A. Correct.**

17 **Q.** And you were briefed on that; correct?

18 **A. To some extent, yes. I mean, there were**

19 **so many interviews done. I wasn't given a synopsis**

20 **of every interview that was done.**

21 **Q.** And between those interviews and the

22 interviews you conducted with Mr. and Mrs. Mercer,

23 did you learn of the existence of Rotillo Vasquez?

24 **A. I don't think so. We'd have to check the**

25 **transcript.**

1 **Q.** Well, as you sit here today, you heard

2 Rotillo's name several times; correct?

3 **A. Correct.**

4 **Q.** As I recall, he was the fellow who cut up

5 the firewood that was to be used during the sweat

6 lodge ceremony. Correct?

7 **A. Correct.**

8 **Q.** He was the person who identified which

9 wood was going to be cut and stacked; correct?

10 **A. I think that was Michael Hamilton.**

11 **Q.** Well, correct me if I'm wrong, but

12 Mr. Hamilton said, use this wood, and he pointed to

13 that big pile; correct?

14 **A. It was my understanding that it was**

15 **pretty clear that the D logs were to be cut up and**

16 **used.**

17 **Q.** Listen to my question. Rotillo was the

18 guy who actually cut the wood; correct?

19 **A. Correct.**

20 **Q.** Mr. Hamilton wasn't present when he cut

21 the wood; correct?

22 **A. I don't remember what Mr. Hamilton said.**

23 **Q.** So it's logical to assume that Rotillo

24 was the one who chose the wood; correct?

25 **A. I don't think I can answer that.**

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1 **Q.** And he's the guy who stacked the wood;

2 correct?

3 **A. I believe Rotillo cut the wood and**

4 **stacked it over by the sweat lodge.**

5 **Q.** He was -- and we heard this testimony.

6 He was the landscaper; correct?

7 **A. Correct.**

8 **Q.** He was a person presumably involved in

9 reducing the weeds at Angel Valley; correct?

10 **A. I would assume so.**

11 **Q.** He was the person who may have been

12 involved in controlling the insects; correct?

13 **MS. POLK:** Your Honor, objection. There's no

14 testimony -- and, Your Honor, asking this witness

15 from the stand to agree with what testimony has

16 been from other witnesses is improper and

17 misleading.

18 The jury has heard the testimony directly

19 from other witnesses. And I'm not sure what the

20 purpose is to trying to recount or rephrase and, in

21 my opinion, mischaracterize testimony from other

22 witnesses in the form of questions to this witness.

23 **THE COURT:** Counsel can refer to a portion of

24 testimony to direct a question. I've had to --

25 I've instructed the jury repeatedly concerning the

1 accuracy of the testimony. That's something that
2 has to be determined. I know everybody can't turn
3 immediately back to the notes and know right away.
4 But -- and I've also instructed witnesses if they
5 don't think that's the correct testimony, they
6 would speak up and let -- let the attorney, whoever
7 he or she might be at the time, know.

8 So overruled to that extent.

9 To direct a witness to an area of
10 testimony, that may be done, but not with
11 certifying necessarily the -- the accuracy of the
12 recounting.

13 Q. BY MR. KELLY: Here's my point,
14 Detective. You're aware that this guy named
15 Rotillo Vasquez -- that's the name you recall;
16 correct?

17 A. Correct.

18 Q. You never met him; correct?

19 A. Well, I think all I had was the first
20 name of Rotillo later in the investigation. But I
21 think I -- I don't remember knowing Rotillo existed
22 on October 9.

23 Q. Well, you know he exists today; correct?

24 A. Yes.

25 Q. And you knew sometime before we started

1 this trial that he existed; correct?

2 A. Yes.

3 Q. Okay. And you knew that he was the
4 landscaper; correct?

5 A. I don't think I knew he was a landscaper
6 prior to trial. Maybe. I don't remember.

7 Q. You knew before trial that he was one of
8 the people who was helping tend the fires; correct?

9 A. I don't remember hearing that before
10 trial.

11 Q. Here's my point. If Rotillo Vasquez cut
12 the wood, chose the wood that he was going to
13 cut --

14 May I approach the witness?

15 THE COURT: Yes.

16 Q. BY MR. KELLY: This is Exhibit No. 631.
17 It was an interview conducted by Detective Pam
18 Edgerton of Ted and Debbie Mercer on
19 October 8, 2009.

20 MS. POLK: Counsel, can you inform me what
21 you've just instructed the detective to look at?

22 MR. KELLY: 631.

23 MS. POLK: What page?

24 THE WITNESS: This is page 11. This is not an
25 interview that I did and was not aware of this

1 interview on October 9th.

2 Q. BY MR. KELLY: You were the case agent;
3 correct?

4 A. Correct.

5 Q. So you're responsible for the information
6 produced by other detectives; correct?

7 A. Correct.

8 Q. Okay. Did you at any time review the
9 detective's October 8th interview with the Mercers?

10 A. I probably did. I don't remember.

11 Q. And that interview has Rotillo's first
12 name, does it not?

13 A. It does.

14 Q. Okay. So here's my question: We have a
15 guy who's the landscaper -- correct? -- apparently?

16 A. That's what you've said. And I have no
17 reason to disagree.

18 Q. It's not what I'm saying, Detective.
19 It's what's in your case file; correct?

20 A. I don't -- I don't remember when I
21 learned that he was a landscaper. I think we heard
22 some testimony to that effect during trial. So
23 I'll agree that he -- part of his duties was
24 landscaping.

25 Q. He was there apparently on

1 October 8, 2009, given the detective's interview;
2 correct?

3 A. Correct.

4 Q. He may have information regarding the use
5 of herbicides; correct?

6 A. Correct.

7 Q. He may have information regarding the use
8 of pesticides; correct?

9 A. Correct.

10 Q. He may have information regarding the use
11 of the wood that was burned; correct?

12 A. Correct.

13 Q. He may have information regarding what
14 people said; correct?

15 A. Correct.

16 Q. He may have information regarding the
17 policies of Angel Valley as it relates to pesticide
18 control; correct?

19 A. Correct.

20 Q. He may have information relating to the
21 policies of Angel Valley as it relates to herbicide
22 control; correct?

23 A. Correct.

24 Q. And he was never interviewed; correct?

25 A. Correct.

1 Q. And you -- your agency has the ability to
2 find people to interview him; correct?

3 A. Correct.

4 Q. I mean, it's not unusual to find a person
5 and locate them and conduct an interview. Fair
6 statement?

7 A. Correct.

8 Q. Never even made an effort to look for
9 him, did you?

10 A. Correct.

11 MR. KELLY: Your Honor, would this be a good
12 time?

13 THE COURT: We can do that.

14 Ladies and gentlemen, we will take the
15 noon recess at this time. Remember the admonition.
16 Please reassemble at 1:30.

17 Detective, you would be excused at this
18 time, as well.

19 I'm going to ask that the parties remain
20 just -- just few minutes.

21 You're excused now for noon recess.

22 Thank you.

23 (Proceedings continued outside presence
24 of jury.)

25 THE COURT: Thank you. Please be seated. The

1 record will show that the jury has left the
2 courtroom. And I'm going to ask that the parties
3 return by 1:20.

4 And just looking at the proposed
5 instruction, I'm going to say this: I don't -- I'm
6 not going to put a theory of the case in -- in an
7 instruction. I'm not going to do that.

8 I think it's appropriate to start off
9 with an instruction regarding the burden. And this
10 instruction contains more than -- than what I
11 believe to be appropriate. But I wanted the state
12 to have an opportunity to provide something and
13 respond to this.

14 It needs to -- it needs to be provided to
15 them, though, and also changed now to indicate
16 there was testimony yesterday and this morning now
17 as well. Mr. Kelly, you went into it very
18 briefly -- into that issue.

19 MR. KELLY: Judge, just for the record, I have
20 to state that I believe I was forced to do that as
21 a remedial measure.

22 THE COURT: I'm not questioning that. That's
23 not -- I just want to make sure now that it's --
24 it's been mentioned twice and --

25 MR. KELLY: Thank you.

1 THE COURT: I want to look at the Marshall
2 case as well.

3 So I'll see you at 1:20. Thank you.
4 (Recess.)

5 THE COURT: Thank you. Please be seated.
6 The record will show the presence of
7 Mr. Ray and the attorneys. The jury is not
8 present.

9 I've looked at the instruction, and I --
10 I have a proposed instruction. I have the state's
11 instruction also. And I'll state right now the
12 defense has provided the written motion with its
13 proposed instruction, but I'm -- I'm not going to
14 give any instruction that would put the Court's
15 name or weight behind a theory of the case or
16 behind some statement that there's a weakness in
17 the case. That's -- that's not going to happen.
18 And if you want any further argument on that,
19 you're going to have to put it in writing.

20 With regard to the defendant's request
21 for the inference that may be drawn, I don't find
22 that -- that's a theory type instruction, as well.

23 So what I'm interested in is what the
24 real law is. Because what's happened is there's
25 been extensive questioning somehow indicating that

1 the defense had some obligation to be asking
2 questions about organophosphates. Again, I can't
3 recall ever having had that.

4 So Ms. Polk or Mr. Hughes, whoever is
5 going to address the instruction issue.

6 MR. HUGHES: Yes, Your Honor. The state did
7 submit its proposed instruction. All but the last
8 sentence came from the RAJI, Third Criminal,
9 No. 16. The final sentence is the statement from
10 State, ex rel. McDougall, which was also discussed
11 in the Lehr and the Edmondston cases that are
12 referenced below.

13 I understand that it sounds like the
14 Court is not inclined to give an instruction on an
15 inference at this time.

16 THE COURT: Not at this time. That's correct.
17 Mr. Li.

18 MR. LI: Your Honor, we'll submit on the
19 Court's instruction and our briefings.

20 THE COURT: Then, Mr. Hughes, any further
21 record on the one I've proposed that took out the
22 comments on a court making a comment about
23 weakness, a court making a comment about a
24 potential defense?

25 MR. HUGHES: Your Honor, I have no additional

1 record.

2 THE COURT: Okay. Then I'm going to -- I'll
3 file the state's.

4 And I'll note that right now, Rhondi.
5 The state's proposed instruction is being filed.
6 And also the one that I'll be giving.

7 Okay. Anything else?

8 MR. KELLY: Yes. Judge, I have a scheduling
9 matter.

10 MR. LI: I was going to say no.

11 MR. KELLY: I was speaking with Ms. Polk, and
12 we'd like to break today at 4:00 if possible. And
13 it relates to management of the exhibits and issues
14 relating to the clarity of some of the exhibits.

15 With your permission, Judge, my
16 understanding is that final hour would be used to
17 identify exhibits and then try to provide better
18 copies.

19 If you recall yesterday, you saw all the
20 blue photographs of JRI. Ms. Polk made that
21 request. I don't have an objection.

22 THE COURT: Okay.

23 MS. POLK: That is the -- Your Honor, that --
24 what the state intends to do -- I can explain what
25 happened. The -- in an attempt not to duplicate

1 exhibits, the defense had submitted numerous
2 photographs. And our decision was to use those
3 photographs rather than print copies of those same
4 photographs.

5 I have not seen the original exhibits.
6 What the parties had shared were the digital
7 photographs. And as both parties have noted,
8 what's on the digital photograph does not look like
9 what ultimately got printed. And it would appear
10 that the printer used by the defense just maybe was
11 low on ink, resulting in what are photographs that
12 don't realistically reflect what was seen at the
13 scene.

14 I didn't realize that until I started
15 using them in court. And what I was looking at was
16 the digital information that the defense had
17 provided to me. And I apologize for that.

18 If we can have about an hour with the
19 exhibits today, I can go through all of them,
20 determine which ones that we would then print, and
21 make sure that what gets printed accurately
22 reflects what's in the digital photograph.

23 THE COURT: Okay. I'll just ask Ms. Rybar to
24 inform the jury we'll recess about 4:00 in case
25 anybody needs to make another arrangements.

1 MR. LI: Your Honor?

2 THE COURT: Yes.

3 MR. LI: I just noticed this. If there's any
4 way it could say a defendant instead of a criminal
5 defendant.

6 MR. HUGHES: I have no objection to that.

7 THE COURT: Yes. Okay. And I'm just going to
8 make the change on that right now. And I can do
9 that on the copy that I'm filing and then also the
10 one I'll be reading.

11 MR. LI: Thank you, Your Honor.

12 THE COURT: Okay. And then I just ask that
13 you take the recess that breaks up the time roughly
14 in the middle between when we start and 4:00.

15 MS. POLK: And, Your Honor, we still have the
16 issue of the two documents through
17 Detective Diskin's testimony that the Court wanted
18 to take up.

19 THE COURT: Yes. The --

20 MR. KELLY: Judge, I -- and we'll submit that
21 to you. I thought that the financial information
22 had been briefed and submitted to the Court in
23 pretrial orders. I'll leave it to your decision.

24 THE COURT: Okay. And that -- so you're not
25 raising a foundation issue?

1 MR. KELLY: No.

2 THE COURT: Because there's some way to get
3 that accomplished. And I would permit that if the
4 state needed time to do that. You're saying this
5 is a foundation issue.

6 I think -- and that the ruling has been
7 that what was paid for this seminar, both to Angel
8 Valley and for the Spiritual Warrior, is
9 admissible. That's long been the ruling.

10 MR. KELLY: And, Judge, I believe that the
11 state in the pretrial order was that roughly it
12 costs about \$10,000. And that evidence is in this
13 trial. And I didn't look at those in detail, but
14 the three exhibits, there were varying dollar
15 amounts dependent on different packages purchased.
16 And that was the concern.

17 THE COURT: And I -- and I think what someone
18 else has paid for another event has the same
19 general relevance too. So I think that information
20 is relevant. This does relates to the specific
21 people. And I -- I think it's admissible. I just
22 didn't have time to look and see if there's a lot
23 of extraneous -- there's the cost of other seminars
24 on there. I noticed that.

25 MR. KELLY: It's kind of a concern. I guess

1 in terms of relevance and confusion of issues,
2 appropriateness of discussing the financial aspect
3 of this case, which I don't believe has much to do
4 with manslaughter.

5 THE COURT: Well, I've held and put it in a
6 written ruling that the cost of this seminar is
7 relevant. And I would also say that the cost paid
8 for another JRI seminar would be relevant.

9 So that information could come in.

10 And if there's other things to redact, if
11 you -- I don't know why it would need to be
12 necessarily because it's just the costs of
13 seminars. People know that these things -- they
14 cost. That's not -- that's not surprising.

15 MR. KELLY: I thought we had already agreed or
16 stipulated to the cost of this seminar to be
17 approximately \$10,000. If we haven't done that,
18 we'd be willing to. That's been the evidence thus
19 far. That's not disputed.

20 Now, beyond that, I guess there were all
21 different types of packages that would either
22 reduce -- may reduce that \$10,000 amount. But --

23 THE COURT: And that's the case in this
24 instance as well. I'm just saying it's relevant,
25 Ms. Polk, and it can be admitted, that information.

1 And I -- I don't know offhand what other
2 information might be on there other than just what
3 other seminars would cost. Is there -- there's
4 actual proof of payment is there. And that
5 actually shows what was paid.

6 MS. POLK: Yes, Your Honor.

7 THE COURT: So if you want to have a
8 stipulation of approximate amount, that's fine. If
9 you want to introduce this evidence of what was
10 actually paid, that's admissible as well.

11 MS. POLK: Your Honor, the state is moving to
12 admit the Exhibit, 410. Applies to James Shore.
13 The one that is in Mr. Kelly's hand --

14 MR. KELLY: 401.

15 MS. POLK: 401 applies to Kirby Brown. And
16 then the package that applies to Liz Neuman, which
17 shows the history of her relationship with
18 Mr. Ray's event. And all of these, of course, are
19 business records. They're self-authenticating.
20 They were seized during the search at JRI
21 headquarters. And the state moves for the
22 admission of all three exhibits.

23 MR. KELLY: Judge, here's what I'd like to
24 emphasize is the pretrial order related to these
25 packages on top. This is an advertisement. A

1 starter package, a Warrior, a Harmonic Wealth
2 package. The investment is \$19,380 or 13,685 or
3 7,990.

4 And I thought that we had discussed that
5 these other nonSpiritual Warrior information --
6 financial information was not admissible. That's
7 the objection.

8 This particular 401 indicates the sum of
9 \$9,596 that was paid. That's not a problem. The
10 improper implication that other packages offered by
11 JRI, I think, outweighs any probative value in this
12 case.

13 MS. POLK: Your Honor, I'm looking at the
14 Court's pretrial order. The issue concerned the
15 general financial status of Mr. Ray.

16 THE COURT: Right.

17 MS. POLK: A second issue had to do with his
18 high-pressure sales tactics. And both of those the
19 Court had ruled upon and said that they would not
20 be admissible.

21 I don't believe there's any Court ruling
22 that says the cost of other packages by itself
23 somehow would never come in. And with respect to
24 Mr. Shore, the only event that he paid for and
25 signed up for is reflected in his documents.

1 I believe that's the same for Kirby
2 Brown. She had attended a prior event, but this
3 paperwork -- I'd have to look at it again. I
4 believe it reflects only the Spiritual Warrior
5 event.

6 And then with respect to Liz Neuman,
7 there's a history there that these
8 self-authenticating business records would reflect
9 that she has a long history with James Ray
10 International.

11 THE COURT: When you say
12 "self-authenticating," what particular statute
13 rule? Have you gone through the process about --

14 MS. POLK: Your Honor, if I can have a moment.

15 THE COURT: If there's a process for that. I
16 don't think -- Mr. Kelly is not raising that. His
17 is -- his concern is substantive. And I -- I
18 didn't see that last exhibit that had everything
19 about Liz Neuman's participation. I did not see
20 that.

21 The thing is is with foundation,
22 basically, stipulated, this is a matter that I can
23 consider while you're working with exhibits.

24 MR. KELLY: If I may approach.

25 It's 406, Judge. And -- you know -- I

1 thought that between the pretrial written and oral
2 arguments, this matter had been decided -- the
3 business records, financial records.

4 THE COURT: What I recall is business
5 practices. That was just not going to be a
6 subject. With regard to what participants paid for
7 seminars, I had generally said was admissible. But
8 I think I was confining it to the Spiritual Warrior
9 specifically. And I believe that's in the ruling.
10 And I didn't know that this is still some kind of
11 an issue.

12 MS. POLK: Your Honor, your Court order
13 reflects what you just said.

14 THE COURT: And what -- what is going to be
15 admissible is what -- what seminars alleged victims
16 participated in and the cost. I'm going to admit
17 that. There's a lot of additional information
18 here.

19 Thank you.

20 (Recess.)

21 (Proceedings continued in the presence of
22 jury.)

23 THE COURT: The record will show the presence
24 of the defendant, Mr. Ray, the attorneys, the jury.
25 The witness, Detective Diskin, is on the stand.

1 Mr. Kelly is conducting cross-examination.

2 But first, ladies and gentlemen, I have a
3 special instruction to give to you at this time.

4 Ladies and gentlemen, a defendant is
5 always free to challenge the sufficiency of the
6 evidence with respect to an element or issue upon
7 which the state bears the burden of proof, even
8 without any advance notice of intent to do so.

9 A defendant need not provide the
10 prosecutor or the Court with a preview of his case
11 or his arguments.

12 You heard testimony this morning and
13 yesterday regarding when and how the detective
14 learned about information related to possible
15 organophosphate poisoning.

16 In considering this information, you must
17 remember that the prosecution has the burden to
18 prove all elements of the charged crimes beyond a
19 reasonable doubt. Proof beyond a reasonable doubt
20 is proof that leaves you firmly convinced of the
21 defendant's guilt. The burden of proof never
22 shifts to Mr. Ray, the defendant. Mr. Ray is not
23 required to produce any evidence at all.

24 Mr. Kelly?

25 MR. KELLY: Thank you, Judge.

1 Now I'm behind. I hope everyone can hear
2 me.

3 Q. Sorry, Detective Diskin. I -- you
4 probably prefer otherwise.

5 Detective, right before lunch we
6 discussed some of the techniques, obligations,
7 resources, that you have as an investigator for
8 Yavapai County; correct?

9 A. Yes.

10 Q. And on this particular case, you arrived
11 at the scene at Angel Valley at 8:30 in the morning
12 on October 9th; correct?

13 A. Correct.

14 Q. Who was there when you arrived?

15 A. **There were two of our volunteers inside
16 the mobile command post.**

17 Q. Did you see Mr. and Mrs. Mercer, Fawn
18 Foster, the Hamiltons?

19 A. No.

20 Q. When you arrived, was the yellow tape
21 that we were discussing already placed around the
22 sweat lodge?

23 A. Yes.

24 Q. Now, you told us yesterday during direct
25 that there was a point in time in which you decided

1 to expand the scene; correct?

2 A. No.

3 Q. I thought you said that you had to expand
4 a portion of the yellow tape.

5 A. **They did the night before.**

6 Q. Okay. And about what time? Do you know?

7 A. **I don't know.**

8 Q. So factually, if we understand this, on
9 October 8 someone from your department, a
10 detective, places the yellow tape around the sweat
11 lodge; correct?

12 A. Correct.

13 Q. And then later that evening they expand
14 it; correct?

15 A. Correct.

16 Q. And those weren't the volunteers;
17 correct?

18 A. **Correct. And I'm not certain that it was
19 a detective that first put the crime scene tape up.
20 I'm not sure who it was.**

21 Q. And apparently the reason is, because of
22 all those reasons we discussed, is that you were
23 attempting, as an investigator, to maintain and
24 preserve the integrity of the particular
25 investigation in the scene that you're looking at;

1 correct?

2 **A. Correct.**

3 **Q.** And I believe you answered this before

4 lunch. So you arrived around 8:30. And I take it,

5 then, that there's no one to debrief you at that

6 time as to what happened the day before?

7 **A. Correct.**

8 **Q.** Later on during that day you were, in

9 fact, debriefed; correct?

10 **A. Correct.**

11 **Q.** And who did that, if you recall?

12 **A. From what I remember, it was bits and**

13 **pieces of information coming in as different**

14 **detectives arrived. The detectives that -- that**

15 **showed up later that I talked to -- they had been**

16 **there the night before up until, like, 2:00 in the**

17 **morning. And so as they arrived, they would share**

18 **kind of what they had learned.**

19 **Q.** And I'd like to --

20 THE COURT: The microphone is quite sensitive,

21 Mr. Kelly.

22 MR. KELLY: Thank you, Judge.

23 **Q.** I was asking whether we had pulled these

24 photographs I was going to ask you about.

25 I think we'll move on.

1 Let's see if you agree after that

2 briefing as to what you knew, at least initially on

3 October 9th, 2009. Okay?

4 **A. Okay.**

5 **Q.** First of all, you knew that there was a

6 9-1-1 call at about 5:21 p.m. on October 8;

7 correct?

8 **A. Well, I knew there was a 9-1-1 call. I**

9 **didn't know exactly what time it was.**

10 **Q.** And I believe there's an exhibit in the

11 evidence here, Exhibit 134, that certifies the

12 authenticity of that time.

13 **A. Correct.**

14 **Q.** So you don't have any reason to dispute

15 that?

16 **A. No.**

17 **Q.** On October -- you knew on October 9th

18 that Kirby Brown and James Shore had passed away;

19 correct?

20 **A. Correct.**

21 **Q.** You knew also that four other people --

22 Liz Neuman, Tess Wong, Sidney Spencer, and Stephen

23 Ray -- were in the hospital; correct?

24 **A. Correct.**

25 **Q.** You knew that a total of 11 other

1 participants had been admitted and some of them

2 released and some still remained in the hospital on

3 October 9; correct?

4 **A. From what I remember learning, there were**

5 **about 19 people total that had been transported to**

6 **the hospital.**

7 **Q.** And you knew that many of these

8 participants had been interviewed the night before

9 in the dining hall by Yavapai County Sheriff's

10 Office detectives; correct?

11 **A. Correct.**

12 **Q.** The -- the first person that you

13 interviewed personally was Ted Mercer; correct?

14 **A. Correct.**

15 **Q.** And you knew when you interviewed

16 Mr. Mercer that he made the statement that we've

17 heard about regarding the wrong wood; correct?

18 **A. Correct.**

19 MS. POLK: Objection, Judge. Mischaracterizes

20 the testimony. Mr. Mercer never used the word

21 "wrong wood."

22 MR. KELLY: And I'll rephrase.

23 THE COURT: I believe that's correct.

24 Mr. Kelly is going to rephrase.

25 **Q. BY MR. KELLY:** You knew that he had told

1 you personally, the only thing different that

2 happened on this sweat lodge than other sweat

3 lodges, we used this wood that was here that they

4 cut up. See the wood that's over there? We used

5 that instead of natural tree wood.

6 And you asked him, some of it's pressure

7 treated? And he said, yes. Correct?

8 MS. POLK: Objection, Judge. That

9 mischaracterizes the testimony.

10 MR. KELLY: Your Honor, may I approach the

11 witness?

12 THE COURT: Yes.

13 **Q. BY MR. KELLY:** And this is your interview

14 of Ted Mercer on October 9.

15 **A. I don't believe he was saying that he**

16 **used pressure-treated wood.**

17 **Q.** No. No. I was just reading the script.

18 I -- that's the information you knew; correct?

19 **A. Correct.**

20 **Q.** I used just vernacular, "the wrong wood."

21 But he said, this time we used wood different than

22 we had on other occasions; correct?

23 **A. Correct.**

24 **Q.** There was a discussion between you and he

25 in regards to pressurized wood; correct?

1 **A. Pressure-treated wood.**
 2 **Q.** Excuse me. Pressure-treated wood;
 3 correct?
 4 And also during that interview,
 5 Detective, there was a discussion about the tarps
 6 stored in the pump house and Mr. Mercer mentioning
 7 rat poison; correct?
 8 **A. Correct.**
 9 **Q.** Now, no other personal, one-on-one
 10 interviews that day; correct?
 11 **A. I interviewed Debbie Mercer later that**
 12 **day.**
 13 **Q.** Okay. Anyone else?
 14 **A. While I interviewed Debbie Mercer,**
 15 **Detective Surak interviewed Sarah Mercer. And I**
 16 **didn't interview Sarah Mercer, but then**
 17 **Detective Surak briefed me on what she had said.**
 18 **Q.** So, essentially, add information from the
 19 Mercers?
 20 **A. Correct.**
 21 **Q.** And as a result, then, you began the
 22 process of your investigation in -- in collecting
 23 evidence; correct?
 24 **A. Correct.**
 25 **Q.** And you collected the rocks that we

1 talked about yesterday; correct?
 2 **A. Correct.**
 3 **Q.** And I think we have Exhibit 285, which is
 4 not in evidence.
 5 And if we could publish 317. I believe
 6 that's in evidence.
 7 THE COURT: It is.
 8 **Q.** BY MR. KELLY: So, Detective, this is how
 9 the scene looked on October 9, 2009; correct?
 10 **A. Correct.**
 11 **Q.** And did you move -- is this before that
 12 yellow tape was moved out further?
 13 **A. No.**
 14 **Q.** I can see on the -- at the center left of
 15 that picture that there's some rocks over there.
 16 Correct?
 17 **A. Correct.**
 18 **Q.** And you collected some of those rocks;
 19 correct?
 20 **A. Correct.**
 21 **Q.** And you collected some of the rocks on
 22 the interior of the sweat lodge; correct?
 23 **A. Correct.**
 24 **Q.** You collected, I believe, three rocks
 25 from the interior of the sweat lodge?

1 **A. No.**
 2 **Q.** How many?
 3 **A. I think it was six.**
 4 **Q.** Oh. Six rocks from the interior -- or
 5 excuse me. Six rocks from the interior; correct?
 6 **A. Correct.**
 7 **Q.** And three rocks from the exterior?
 8 **A. Can I look at my evidence log?**
 9 **Q.** Absolutely.
 10 **A. Yes. There were three rocks from outside**
 11 **that we collected.**
 12 **Q.** So three from the exterior, six from the
 13 interior; correct?
 14 **A. Correct.**
 15 **Q.** How many rocks did you leave?
 16 **A. There were several.**
 17 **Q.** You didn't happen to count them, so we
 18 don't know?
 19 **A. We counted the rocks on the inside.**
 20 **Q.** So can you look at your evidence log and
 21 tell the jury how many you left and did not
 22 collect.
 23 **A. It's not on the evidence log. I know we**
 24 **counted them. I don't remember what the number**
 25 **was.**

1 **Q.** Can you give us an approximate.
 2 **A. It was in the 50s.**
 3 **Q.** And then in addition to the rocks, you
 4 also -- and maybe if we can look at Exhibit 512.
 5 Does Exhibit 512, then, show the evidence marker,
 6 including the three rocks you took from the outside
 7 of the pit?
 8 **A. Correct.**
 9 **Q.** And as well as -- and we'll get to
 10 this -- but the wood you collected; correct?
 11 **A. Correct.**
 12 **Q.** Now, moving on to the tarps and
 13 coverings, this morning we had the four cans, the
 14 four evidence items. Do you recall that?
 15 **A. I do.**
 16 **Q.** And they were evidence items 356 through
 17 359, but I don't recall the exhibit in the 900
 18 range. It's in the record; correct?
 19 **A. I think it's 899 to 903.**
 20 **Q.** And those, on October 9, in addition to
 21 the rocks we discussed, you collected those four
 22 ten-inch squares of the covering; correct?
 23 **A. Correct.**
 24 **Q.** And the covering is what's been displayed
 25 to the jury, which includes plastic, some fabric,

1 perhaps blankets, things of that nature; correct?
 2 **A. Correct.**
 3 **Q.** Then, as it shows on 512, you collected
 4 the four D logs we discussed; correct?
 5 **A. Correct.**
 6 **Q.** And those D logs have been shown to the
 7 jury; correct?
 8 **A. Correct.**
 9 **Q.** And you described how you took portions
 10 of those off and sent them to the crime lab;
 11 correct?
 12 **A. Correct.**
 13 **Q.** Didn't collect any of the other wood;
 14 correct?
 15 **A. Not that wood. We collected the wood**
 16 **used for the sweat lodge structure.**
 17 **Q.** Very good.
 18 So let's perhaps blow up the D logs.
 19 You collected four D logs identified as
 20 1, 2, 3, and 4 in Exhibit 512; correct?
 21 **A. Correct.**
 22 **Q.** And what I notice in looking at 1, 2, 3,
 23 and 4, on the end of them they're all approximately
 24 the same color. Do you see that?
 25 **A. Right.**

1 **Q.** So you would agree with me -- see the
 2 darker colored ones?
 3 **A. Yes.**
 4 **Q.** You didn't collect any of those; correct?
 5 **A. Correct. Well, maybe -- some of them may**
 6 **be dark on the other side. The darkness is the end**
 7 **pieces. So I don't -- I'm not sure if the ones we**
 8 **collected were the end pieces on the other side.**
 9 **Does that make sense?**
 10 **Q.** It does. But the actual logs are here
 11 in --
 12 **A. Yes.**
 13 **Q.** -- in evidence. So if the jury wants to
 14 look at them, they can.
 15 **A. Yes.**
 16 **Q.** And my point is, I see darker colored
 17 ones.
 18 **A. Correct.**
 19 **Q.** I've heard testimony that that's due to
 20 weathering.
 21 **A. Correct.**
 22 **Q.** And I guess that can be a possibility;
 23 correct?
 24 **A. That's what it appeared to be. Yes.**
 25 **Q.** But it could also be to some type -- due

1 to some type of oil; correct?
 2 **A. No. I don't think so.**
 3 **Q.** Would you agree with me you didn't take
 4 one to sample? Correct?
 5 **A. That's correct.**
 6 **Q.** Now, take a look at the little pile to
 7 the left. You were asked extensive questions about
 8 that pile; correct?
 9 **A. Correct.**
 10 **Q.** And, again, this jury doesn't have any
 11 evidence as to any type of tests which may have
 12 been conducted on that pile because you didn't
 13 collect any; correct?
 14 **A. Correct.**
 15 **Q.** Let's -- if we can go back out and see
 16 the little pile back by the intentions fire, that
 17 was all what's been referred to as "tree wood";
 18 correct?
 19 **A. Correct.**
 20 **Q.** And I believe you drew the conclusion, if
 21 we can go back, that the intention fire was
 22 probably using some of that wood in the little
 23 stack because of its proximity; correct?
 24 **A. Correct. And if I could add to that,**
 25 **the -- the intention fire is just a small, little**

1 **fire for them to burn their paper intentions. So**
 2 **you're not going to use those giant logs to start a**
 3 **fire that's just going to burn a few minutes.**
 4 **Q.** Oh, absolutely not. That's not my point.
 5 My point is I think you told us yesterday that
 6 given the proximity of that little pile to the
 7 intention fire, you're thinking that some of that
 8 wood was used in the intention fire?
 9 **A. Correct.**
 10 **Q.** Now, if we could go back to the other --
 11 and my question is, did you consider the
 12 coincidence of the little pile of lumber, not the
 13 D logs, but the little pile of lumber next to the
 14 rock fire and the probability that it was used in
 15 some fashion to build that fire?
 16 **A. Did I consider that as a possibility?**
 17 **Q.** Yes.
 18 **A. No.**
 19 **MR. KELLY:** If we blow up the little stack of
 20 wood, please. 512.
 21 **Q.** And you told us that -- see this little
 22 piece on the right that appears to be a green tint?
 23 **A. Uh-huh.**
 24 **Q.** You told us about your experience
 25 building houses; correct?

1 **A. Correct.**
 2 **Q.** And you know that some pressure-treated
 3 wood or something that's called "green plate" by
 4 contractors is impregnated; correct?
 5 **A. Correct.**
 6 **Q.** And sometimes you can see that
 7 indentation on the green wood where they put the
 8 chemical into the wood; correct?
 9 **A. Right.**
 10 **Q.** And would you agree with me that there's
 11 treated wood that is not impregnated?
 12 **A. I've only seen the green wood. That's**
 13 **the only thing that I've ever used that has those**
 14 **marks on it. I'm not familiar with any other kind**
 15 **of pressure-treated wood.**
 16 **Q.** So you wouldn't have a reason to dispute
 17 that there's pressure-treated wood that's green in
 18 color that doesn't have the impregnated marks that
 19 you were looking for?
 20 **A. I wouldn't know.**
 21 **Q.** And then see the piece of plywood?
 22 **A. Yes.**
 23 **Q.** See it has a different color?
 24 **A. Sure.**
 25 **Q.** Might be weathering; correct?

1 **A. Could be.**
 2 **Q.** Could be oil; correct? We don't know?
 3 **A. I don't know.**
 4 **Q.** And the reason -- one of the reasons we
 5 don't know is because no samples of this little
 6 pile were taken and submitted to the crime lab;
 7 correct?
 8 **A. Correct.**
 9 **Q.** Now, in addition to the wood, you took
 10 the willow branches that made the kiva; correct?
 11 **A. I -- I took some of the uprights from the**
 12 **inside.**
 13 **Q.** And I think you guys discussed that on
 14 direct, some of the uprights. Did you take any of
 15 the horizontal pieces?
 16 **A. I don't think I did.**
 17 **Q.** And, finally, you collected four samples
 18 of the soil inside the sweat lodge, if you want to
 19 check your log; correct?
 20 **A. That's correct. Yes. I didn't collect**
 21 **them. I asked that they be collected.**
 22 **Q.** And those were marked as evidence items
 23 350 through 353.
 24 **MS. POLK:** Your Honor, for sake of clarity,
 25 **Mr. Kelly is referring to the item evidence markers**

1 and not exhibits in court.
 2 **MR. KELLY:** Yeah. I apologize.
 3 **Q.** You marked them as a particular number;
 4 correct?
 5 **A. Correct.**
 6 **Q.** But I believe in this case they're
 7 exhibits 541 through 544, to clarify the record.
 8 **MS. POLK:** Your Honor, I believe that
 9 Mr. Kelly might be referring to photographs.
 10 **MR. KELLY:** Correct.
 11 **THE COURT:** Okay.
 12 **MS. POLK:** The samples have been marked, and
 13 they have a different number.
 14 **THE COURT:** Okay. You're referring to the
 15 photos. I just want to note, Counsel, at some
 16 point there really needs to be a correlation made
 17 between the demonstrative exhibit and the
 18 photographs. They're two different numbers. And I
 19 was talking to the clerk about that, and that needs
 20 to be done.
 21 But anyway.
 22 **Q. BY MR. KELLY:** So after all that
 23 confusion, let's put up 541, which is already in
 24 evidence.
 25 And this is a photograph of some of those

1 soil samples taken from inside the sweat lodge;
 2 correct?
 3 **A. Correct.**
 4 **Q.** And 542. In addition to that, Detective,
 5 in addition to these four samples, you took a scoop
 6 of the soil from the inside of the rock pit inside
 7 the sweat lodge?
 8 **A. Correct. I didn't take the actual scoop,**
 9 **but we did take a scoop.**
 10 **Q.** Yeah. When I'm talking about you, I'm
 11 talking about collectively your investigative team.
 12 **A. Correct.**
 13 **Q.** And then, finally, the water samples.
 14 You took -- I misspoke.
 15 You took Exhibit 512, which is a scoop of
 16 dirt from outside the fire pit; correct?
 17 **A. Correct.**
 18 **Q.** And point that out, if you can, to the
 19 jury. Which evidence item is it?
 20 **A. I'm pretty sure it's the No. 5 there.**
 21 **But I need to check my notes to --**
 22 **Q.** Because the other three are the rocks we
 23 talked about?
 24 **A. Right. I'm pretty sure.**
 25 **No. I have that No. 6 -- that's not a**

1 **rock. That's the scoop of dirt. And No. 5 must be**
 2 **marking this rock here.**
 3 Q. So 5, 7, and 8 are the rocks collected?
 4 A. **Correct.**
 5 Q. And No. 6 was the soil collected;
 6 correct?
 7 A. **Correct.**
 8 Q. Then in addition to that, on October 9
 9 you collected some water samples; correct?
 10 A. **Correct.**
 11 Q. And I believe you told us from the -- the
 12 two jugs, the lemon water and the electrolyte;
 13 correct?
 14 A. **Correct.**
 15 Q. And then Ms. Neuman's water bottle;
 16 correct?
 17 A. **I thought we took her water bottle. I**
 18 **think the sample of her water bottle was taken the**
 19 **night before by one of the deputies. And then I**
 20 **think when we did the search warrant, we actually**
 21 **seized her entire water bottle.**
 22 Q. In addition to that you took the tobacco
 23 pouches, one of which was opened yesterday and
 24 shown to the jury; correct?
 25 A. **Correct.**

1 Q. And how many -- go ahead and look at your
 2 log. How many tobacco pouches did you mark and
 3 collect as evidence that day?
 4 A. **Looks like we have 12 different item**
 5 **numbers that go to the tobacco pouches. But I**
 6 **think some of the items were multiple strings of**
 7 **tobacco pouches that were found together.**
 8 Q. And each one of those is marked in one of
 9 these Manila envelopes; correct?
 10 A. **Correct.**
 11 Q. Have I missed anything in terms of
 12 evidence that you collected on October 9?
 13 A. **Yes.**
 14 Q. What is that?
 15 A. **There were -- there were several other**
 16 **things outside the sweat lodge that we took. There**
 17 **were clothing, other water bottles, the sage, the -**
 18 **kit. And also in the sage box was -- was**
 19 **sandalwood and a few other things.**
 20 Q. Let me rephrase my question. Inside the
 21 perimeter of that yellow tape, the investigative
 22 scene, did I cover everything that you seized?
 23 A. **Well, no. The other stuff I talked about**
 24 **was still inside the perimeter.**
 25 Q. Okay. So the -- some of the clothing was

1 inside the perimeter and --
 2 A. **Correct.**
 3 Q. -- the first aid wasn't? Or was it
 4 inside --
 5 A. **Let me just clarify. Are we talking the**
 6 **perimeter of the sweat lodge itself or the**
 7 **perimeter of the crime scene?**
 8 Q. The perimeter of the tape.
 9 A. **Okay. Yes. All that stuff was inside**
 10 **the perimeter of the tape.**
 11 Q. Anything else?
 12 A. **I'm sure there was. Would you like me to**
 13 **go through it?**
 14 Q. Well, have I covered the rocks that you
 15 collected?
 16 A. **Correct.**
 17 Q. Any other rocks than we discussed?
 18 A. **No.**
 19 Q. We covered the wood that you've
 20 collected?
 21 A. **Correct.**
 22 Q. Any other wood you collected?
 23 A. **No.**
 24 Q. Have I covered the tarp that you've
 25 collected?

1 A. **Yes.**
 2 Q. No other tarp?
 3 A. **No.**
 4 Q. And the soil samples?
 5 A. **Correct.**
 6 Q. Now, you were instructed -- your office.
 7 Not you personally. But the DPS crime lab asked
 8 you to come back to the scene to get a control
 9 sample, I believe, on October 20 -- 20th or so,
 10 2009; correct?
 11 A. **Correct.**
 12 Q. And you sent someone out to do that or
 13 did you do that?
 14 A. **No. Someone else went.**
 15 Q. Now, once that evidence is collected, you
 16 then release the scene, so to speak; correct?
 17 A. **Are we talking about the soil samples**
 18 **from -- that we went back --**
 19 Q. That we just talked about.
 20 A. **Okay. Yes.**
 21 Q. The soil, the tarp, the rocks, the wood.
 22 A. **Correct.**
 23 Q. And you leave, I believe, at 7:00 or
 24 8:00 o'clock that evening; correct?
 25 A. **Correct.**

1 Q. Now, you knew on that day that Mr. Mercer
2 made the statement about the wood; correct? We
3 just went over it.
4 A. Right. He told me the wood that he used,
5 which was this wood here.
6 Q. I'm saying he made the statement, the
7 only thing different was the wood.
8 A. Right.
9 Q. You're aware of that?
10 A. That he had burned this wood here.
11 Q. And you saw, I think you told us, a pile
12 of wood that included some pressure-treated wood
13 some distance away from the fire pit. Correct?
14 A. Correct.
15 Q. And he told you about the rat poison
16 statement; correct?
17 A. Correct.
18 Q. And you didn't go take a look in the pump
19 house, did you?
20 A. No.
21 Q. You heard Ms. Foster testify about AMDRO
22 ant poison during this trial; correct?
23 A. Correct.
24 Q. You didn't go take a look in the shop at
25 Angel Valley; correct?

1 A. Correct.
2 Q. To know whether or not that AMDRO was
3 present on October 8, 2009?
4 A. Correct.
5 Q. So, of course, we'll never know; correct?
6 A. There was no information about the AMDRO
7 until after -- I believe it was 2010 when Fawn
8 testified that she had used the AMDRO.
9 Q. Your search was limited to this area.
10 And despite the statement from Mr. Mercer, you
11 didn't look in the pump house; correct?
12 A. Correct.
13 Q. You didn't go to the shop to see what any
14 other type of chemicals might be used on Angel
15 Valley land; correct?
16 A. There was no mention of a shop.
17 Q. But you didn't know?
18 A. Right.
19 Q. Now, I'd like to put up Exhibit 214,
20 which is in evidence. And under description --
21 If we can blow that up. Just the first
22 two lines.
23 This is an EMS report that's in evidence.
24 And you'd agree with me that it's from October 8;
25 correct?

1 A. I would assume so. That's when the
2 incident was.
3 MS. POLK: Could I get the number?
4 MR. KELLY: Yeah. It's 214.
5 Q. And then under the description it says,
6 MCI, whatever that means, and outdoor retreat with
7 multiple casualties from a possible chemical
8 exposure. Correct?
9 A. That's what it says.
10 Q. Now, again -- you know -- and I
11 understand, Detective Diskin, the difference
12 between perhaps what you know or what you remember
13 versus what your responsibility is as a case agent.
14 So please understand I'm not picking on you.
15 But this is a report that was produced
16 during this investigation; correct?
17 A. Correct.
18 Q. And it indicates from a trained EMS
19 medical provider, possible chemical exposure;
20 correct?
21 A. Correct.
22 Q. And then if you look at the last line
23 here --
24 If you blow that up -- it says -- the
25 final line. Perhaps that last line.

1 It says, bystanders stated they had a
2 wood fire and someone was placing oils on the fire
3 prior to the incident; correct?
4 A. That's what it says.
5 Q. And that was information that was
6 collected by the State of Arizona during its
7 investigation of this case; correct?
8 A. Correct.
9 Q. Again, we talked about Rotillo Vasquez
10 before lunch. But there were no interviews
11 conducted to determine whether or not someone was
12 placing oils on the fire prior to the incident;
13 correct?
14 A. Correct.
15 Q. It's my understanding that there wasn't a
16 discussion with the Hamiltons about the wood used
17 until October 26, 2009. Correct?
18 A. Correct.
19 Q. You didn't speak to them on October 9,
20 the day you were there; correct?
21 A. I talked to them, but we didn't -- it
22 wasn't, like, an official interview.
23 Q. And as you're developing your beliefs in
24 this case to focus your investigation, you didn't
25 interview these EMS folks, did you?

1 **A. No.**
 2 **Q.** When I say "EMS", I mean emergency
 3 medical services individuals. Correct?
 4 **A. Correct.**
 5 **Q.** If we can take a look at --
 6 MR. KELLY: Judge, may I approach the witness?
 7 THE COURT: Yes.
 8 **Q.** BY MR. KELLY: Detective, take a look
 9 through the stack of photographs. Do you recognize
 10 those as photographs taken on or near the date of
 11 your investigation?
 12 **A. I do except for the first two.**
 13 **Q.** Just set those aside.
 14 **A. These two pictures. They were probably**
 15 **taken by us, but I can't really see them.**
 16 **Something was wrong with the printer when we**
 17 **printed.**
 18 **Q.** And you're referring to exhibits 487 and
 19 486; correct?
 20 **A. Correct.**
 21 **Q.** Detective, take a look at 486. Do you
 22 recognize that as the lumber pile that you were
 23 standing next to when you were speaking to
 24 Mr. Mercer?
 25 **A. I do.**

1 MR. KELLY: Your Honor, move to admit 486.
 2 THE COURT: Ms. Polk.
 3 MS. POLK: Your Honor, the state will
 4 stipulate to the admission subject to the
 5 substitution of a -- it's a very poor photograph.
 6 I believe that a better photograph can be produced.
 7 And subject to the agreement that a better
 8 photograph can be substituted, I would agree.
 9 THE COURT: Okay. So for now 486 is admitted.
 10 (Exhibit 486 admitted.)
 11 **Q.** BY MR. KELLY: The same thing with 487.
 12 Different photograph, same pile; correct?
 13 **A. Correct. I'm not -- it appears to be the**
 14 **same pile. I'm not sure where this picture came**
 15 **from. That was from the night before.**
 16 **Q.** There's a fire truck in it; right?
 17 **A. Right.**
 18 MR. KELLY: Your Honor, I'd move to admit 487
 19 subject to the same offer by the state to try to
 20 get better photos.
 21 THE COURT: Ms. Polk, so that's the
 22 understanding?
 23 MS. POLK: Yes, Your Honor.
 24 THE COURT: So 487 will be admitted now. And
 25 what I'm going to do is order the clerk to just use

1 the same number when the substitute photographs are
 2 provided.
 3 (Exhibit 487 admitted.)
 4 MR. KELLY: And may we publish 486?
 5 THE COURT: Yes.
 6 MR. KELLY: Judge, I would move --
 7 THE COURT: Mr. Kelly, there's a number of
 8 exhibits there. If you're going to read them, I'm
 9 going to ask the clerk to -- they're agreed on?
 10 MR. KELLY: They are.
 11 THE COURT: Then, Mr. Kelly, if you could just
 12 read the numbers, and the clerk will note that.
 13 MR. KELLY: Judge, the numbers are 540, 547,
 14 539, 538, 537, 536, 535, 534, 533, 531, 530, 525,
 15 524, 523, 521, 519, 517, 516, 515, 514, 513, 510,
 16 509, 506, 501, 500, 499, 498, 495, 494.
 17 THE COURT: Those exhibits just named by
 18 Mr. Kelly are admitted.
 19 (Exhibits 494, 495, 498-501, 506, 509,
 20 510, 513-517, 519, 521, 523-525, 530, 531, 533-540,
 21 and 547 admitted.)
 22 **Q.** BY MR. KELLY: Detective, when you flip
 23 through these, these are generally photos of the
 24 scene on October 8th and October 9th, various
 25 different aspects; correct?

1 **A. Correct.**
 2 **Q.** Now, I'd like to go back to your
 3 investigation that day. And I asked you about the
 4 tarps referenced by Mr. Mercer --
 5 MR. KELLY: And if we can publish 797.
 6 **Q.** You recognize this as a picture provided
 7 by the Hamiltons in 2011; correct?
 8 **A. Correct.**
 9 **Q.** All right. But it apparently is the pump
 10 house that the Hamiltons and Mr. Mercer were
 11 referring to; correct?
 12 **A. Correct.**
 13 **Q.** I believe there was testimony about
 14 storing the tarps on the table above, something
 15 like that; correct?
 16 **A. Correct.**
 17 **Q.** And if we look at 798, that was one of
 18 the photographs provided by the Hamiltons showing
 19 that Just One Bite critter biscuit or Just One Bit
 20 rat poison on the plate; correct?
 21 **A. Correct.**
 22 **Q.** And then above it the table; correct?
 23 **A. Correct.**
 24 **Q.** And you said you built a few -- few
 25 houses; correct?

1 **A. Correct.**

2 **Q.** And you recognize this plate here between
3 the D log and the concrete as the pressurized,
4 treated wood that prevents termites in a house or
5 infecting the side of a house; correct?

6 **A. No. That -- I think that's just**
7 **baseboard.**

8 **Q.** You know from building a house that you
9 have to put pressurized wood between concrete and
10 the wall of a home to prevent termite infestations?
11 It's a question.

12 **A. Correct.**

13 **Q.** Okay. And you don't think that's treated
14 wood?

15 **A. Well, you can't see it right there.**
16 **There's going to be pressure-treated wood**
17 **underneath the D logs as soon as you go up from the**
18 **concrete. You can't see it in the picture.**

19 **Q.** All right. And that's my point. And
20 when you were standing next to that big pile of
21 wood that the poor photograph of is, you saw some
22 of that pressure-treated wood; correct?

23 **A. Correct.**

24 **Q.** And you know from your experience that
25 pressure-treated wood has something called CCA?

1 **A. I don't know that. I know it's -- it's**
2 **not -- it's toxic.**

3 **Q.** Did you hear testimony in this trial
4 about copper chromium arsenate?

5 **A. I did.**

6 MS. POLK: Your Honor, objection. There was
7 no testimony about copper -- about the CCA. There
8 was a question posed by defense counsel, but there
9 has been no testified testimony about it.

10 THE COURT: I believe that's correct.

11 MR. KELLY: I apologize, Judge, if I
12 misunderstand.

13 **Q.** But you're -- you're aware that you can't
14 burn the stuff; correct?

15 **A. Correct.**

16 **Q.** Because it's potentially dangerous;
17 correct?

18 **A. That's my understanding.**

19 **Q.** And you were aware, were you not, of a
20 communication from the crime lab asking you or
21 asking your agency specific questions about whether
22 or not the wood was treated?

23 **A. Correct.**

24 **Q.** And presumably, again, because,
25 consistent with your knowledge, if treated wood is

1 used on porous rocks to heat up during a sweat
2 lodge, that could contain ash, then add water,
3 might have a problem?

4 **A. Can I explain?**

5 **Q.** Sure.

6 **A. The conversations with the lab about**
7 **treated wood was questions that I had, whether or**
8 **not those D logs had been treated with, like, a**
9 **wood stain or some type of a preservative. That's**
10 **different than pressure-treated wood.**

11 **They're just two different things.**

12 **There's pressure-treated wood, and then there's**
13 **treated wood with a stain or any other type of**
14 **preservative just to preserve it.**

15 **Q.** And the reason it's important is because
16 it potentially can cause problems if you use
17 treated wood, treated D logs, pressure-treated
18 wood, stained plywood, something of that nature,
19 gets in the porous volcanic rocks. Take it inside
20 an enclosed area like the sweat lodge, add water,
21 create steam, might have a problem from an
22 investigative standpoint?

23 **A. Right. I can't say that there would be a**
24 **problem. But it's something that we would have**
25 **looked into. Had those logs ended up being treated**

1 **with some kind of chemical, we'd have to find out**
2 **what the chemical is. And if it's possible that if**
3 **you heated rocks with wood, if that chemical**
4 **involved in the sweat lodge could actually**
5 **contaminate people.**

6 **Q.** And what I'm getting at is the scope of
7 your investigation -- again, I don't want to repeat
8 it all. But you didn't -- you collected only the
9 wood that we've discussed in this trial and is in
10 this courtroom; correct?

11 **A. Correct.**

12 **Q.** And there was a discussion with Dawn Sy
13 from the crime lab about treated wood from these
14 log cabins -- correct? -- which you believe is the
15 D logs?

16 **A. Correct.**

17 **Q.** And we talked about the darker shaded
18 D logs that were not collected; correct?

19 **A. It was just the ends, the ends of some of**
20 **the D logs. Because these were long sticks of D**
21 **logs, and they were cut up. So the pieces that**
22 **were on the ends are going to be darkened because**
23 **they're out exposed to the weather. But the fresh**
24 **cuts aren't exposed to the weather. That's why**
25 **they're white.**

1 Q. And then also in the crime lab you
2 understood a basic testing deficiency in that the
3 crime lab could never mirror the actual
4 circumstance because they couldn't reach those
5 temperatures; correct?
6 A. **The crime lab couldn't duplicate burning
7 wood. In other words, they couldn't -- they
8 couldn't heat the wood to the same temperature it
9 would have been burning in the -- in the bonfire
10 with the rocks.**

11 Q. Right. And you guys talked about that;
12 correct?

13 A. **I didn't but someone from my office did.**

14 Q. And on November 3rd, 2009, your
15 department was asked a specific question from
16 Ms. Sy about whether or not any of the wood had
17 markings and whether or not it was pressure
18 treated; correct?

19 A. **I don't recall that.**

20 MR. KELLY: May I approach, Judge?

21 THE COURT: Yes.

22 Q. BY MR. KELLY: I'm go to approach and
23 just ask you to take a look at Exhibit 584, which
24 is identified as a communications log, and just ask
25 you to read that paragraph.

1 MS. POLK: Could counsel show me what
2 paragraph you're referring to.

3 MR. KELLY: The one on November 3rd, 2009.

4 THE WITNESS: There's two on November 3.

5 Q. BY MR. KELLY: Read them both.

6 A. **They're eating with --**

7 Q. No. No. Just read it to yourself.

8 A. **Oh. Got you.**

9 Q. Is that --

10 May I approach?

11 THE COURT: Yes.

12 Q. BY MR. KELLY: My question is, was there
13 a discussion between the crime lab and your
14 department about the fact of pressurized -- or
15 pressure wood?

16 A. **There was some question whether or not
17 the wood that was used was pressure treated.**

18 Q. Correct. And, again, presumably because
19 that had some evidentiary value in this case?

20 A. **I can't testify to the reasons why Dawn
21 Sy was --**

22 Q. No. I'm not asking you to do that.
23 You're the case agent. So you understand that you
24 have to collect and preserve the evidence for this
25 jury to look at because if you don't do it, nobody

1 else is going to; correct?

2 A. **Correct.**

3 Q. Okay. So my question is, apparently,
4 according to this communication log, even the DPS
5 crime lab had an issue with pressurized wood;
6 right?

7 MS. POLK: Your Honor, that would be a
8 mischaracterization --

9 MR. KELLY: I'll withdraw that question.

10 THE COURT: Okay.

11 Q. BY MR. KELLY: Now, Detective --

12 MS. POLK: Your Honor, can I finish? I was
13 making a statement --

14 THE COURT: The question that was just
15 withdrawn is to be disregarded by the jury.

16 MR. KELLY: And if we can publish 345.

17 Q. We talked about this. This is the report
18 that was received by your office -- or excuse me.
19 It was authored the day after the grand jury
20 indictment; correct?

21 A. **Correct.**

22 Q. And on the second page it talks about
23 volatiles detected in two D logs.

24 A. **Can I look at my copy?**

25 Q. Oh, absolutely.

1 Do you see what I was referring to on
2 345?

3 MS. POLK: Judge, I'm sorry.

4 Mr. Kelly, what's up on the overhead has
5 been highlighted. The exhibit that's been admitted
6 into evidence is not highlighted.

7 MR. KELLY: That's true.

8 THE COURT: And that can be noted. That --
9 that highlighting has just been superimposed.
10 Correct, Mr. Kelly?

11 MR. KELLY: That's correct.

12 Q. Detective, evidence items No. 500 and 502
13 are D logs; correct?

14 A. **Can I just --**

15 Q. It's on the face page of that same
16 document.

17 A. **There's -- there's four that say, can
18 containing wood. And I think two of those were
19 from the uprights. And I'm not sure which two
20 those were. If I can look at my evidence log --**

21 Q. You know that this evidence is from the
22 sweat lodge; correct?

23 A. **Correct.**

24 Q. Or the fire that was built to heat the
25 rocks; correct?

1 **A. Correct.**
 2 **Q.** And my point is, it says -- well, now
 3 it's blown up. No. 500 was a can containing wood;
 4 correct?
 5 **A. Correct.**
 6 **Q.** You took two splinters off the D logs and
 7 sent them to the crime lab?
 8 **A. Correct.**
 9 **Q.** And then the analysis is that two of
 10 those D logs contained volatiles; correct?
 11 **A. Correct.**
 12 **Q.** And here's my point: Yesterday you
 13 talked about what your understanding of volatiles
 14 was. Do you recall that?
 15 **A. Yes.**
 16 **Q.** And what volatiles actually are are a
 17 group of chemical elements which include nitrogen,
 18 carbon dioxide, ammonia, hydrogen, methane, and all
 19 compounds of carbon, hydrogen, oxygen, or nitrogen,
 20 as well as sulfur dioxide; correct?
 21 **A. I have no idea.**
 22 **Q.** Okay. But what my point is is you made
 23 it --
 24 MS. POLK: Your Honor?
 25 THE COURT: Yes?

1 MS. POLK: Your Honor, two things. First of
 2 all, the witness had asked if he could look at his
 3 report to determine what items 500 and 502 are. He
 4 had stated he wasn't sure that those were the
 5 D logs. He had asked for time to look at his log
 6 and wasn't given that time. And then Mr. Kelly
 7 continued to talk about D logs.
 8 I would ask that the witness be given
 9 time to actually determine what the items are.
 10 And then second, the -- I just want the
 11 record to reflect that what Mr. Kelly just read
 12 from is not part of this report that is up on the
 13 overhead. It's not part of the crime lab report.
 14 It's additional information.
 15 THE COURT: So there's an objection to the
 16 question?
 17 MS. POLK: Yes.
 18 THE COURT: Okay. Sustained as to the
 19 question.
 20 Mr. Kelly, as to allow him -- well --
 21 MR. KELLY: Can I ask one question, and we'll
 22 take a break? Heidi said I have to take a break at
 23 3:45.
 24 THE COURT: Okay.
 25 **Q.** BY MR. KELLY: Detective, here's my

1 point: You don't know what volatiles are; correct?
 2 **A. I know what Dawn Sy -- or actually, not**
 3 **Dawn Sy, but Dawn Sy's supervisor. When I talked**
 4 **to him at the lab, he explained what volatiles**
 5 **were.**
 6 **Q.** Did he explain they're nitrogen, carbon
 7 dioxide, ammonia, hydrogen, and sulfur dioxide?
 8 MS. POLK: Same objection.
 9 THE COURT: Sustained.
 10 **Q.** BY MR. KELLY: Did he explain that --
 11 THE COURT: Well -- just a second.
 12 That's a yes or no question. Phrased in
 13 that, you may answer that.
 14 THE WITNESS: No.
 15 THE COURT: Okay.
 16 **Q.** BY MR. KELLY: What did he tell you they
 17 were?
 18 **A. I asked the -- the lab to test for toxins**
 19 **in these different items. The lab explained that**
 20 **these aren't -- that they don't refer to these as**
 21 **"toxins," that they're called "volatiles." And**
 22 **they test for volatiles.**
 23 **And when they heat up an item, chemicals**
 24 **that are emitted from heating up that item are**
 25 **called "volatiles." And that's what they were**

1 **going to test for. But he didn't go into detail**
 2 **about what a volatile was.**
 3 **Q.** Okay. So the statement that I mentioned
 4 about nitrogen, carbon dioxide, ammonia, hydrogen,
 5 methane, and sulfur dioxide, you just don't know?
 6 **A. I don't know.**
 7 THE COURT: The other -- the other part too,
 8 though, the detective can review the reports if
 9 there's a question about that.
 10 If you need to review your reports, I'd
 11 like you to do that before we take the recess if
 12 there's any question about that.
 13 THE WITNESS: Yes.
 14 Item 500 and 502 are both samples from
 15 items 300 and 302, which were the D logs.
 16 MR. KELLY: Thank you, Detective.
 17 And thank you, Judge.
 18 THE COURT: Okay. Then we will take the
 19 afternoon recess.
 20 Ladies and gentlemen, please be
 21 reassembled at 3:00. I really want to start as
 22 soon as we can after that. I think Ms. Rybar has
 23 indicated that we do need to recess at 4:00, as it
 24 turns out.
 25 So we'll be in recess. Remember the

1 admonition. Thank you.

2 (Recess.)

3 THE COURT: The record will show the presence
4 of Mr. Ray, the attorneys, the jury. The witness
5 is back on the witness stand.

6 And, Mr. Kelly, you may continue.

7 MR. KELLY: Thank you, Judge.

8 Q. Detective, I put in front of you during
9 the break exhibits -- or some documents marked as
10 exhibits 417 through 447. Did you get a quick
11 chance to review those?

12 A. Yes.

13 Q. And do you recognize those as participant
14 waivers and releases that were located in proximity
15 to the releases for James Shore, Kirby Brown, and
16 Liz Neuman?

17 A. Yes.

18 Q. I think it was near a backpack.

19 A. **I found a set of waivers in the backpack.**
20 **I don't remember if it was this set in the backpack**
21 **or the Angel Valley waivers or both. I don't have**
22 **crime scene -- or the search warrant photos of JRI**
23 **in front of me to be -- be certain.**

24 Q. And -- and do you recall the testimony on
25 direct examination regarding the waivers for both

1 Angel Valley and JRI relating to the three deceased
2 individuals in this case?

3 A. Yes.

4 Q. And are you confident that you would have
5 located those waivers, which are 417 through 447,
6 at either the backpack location at Angel Valley or
7 during the execution of the search warrant of JRI
8 in Carlsbad, California?

9 A. **Well, the backpack was at JRI in**
10 **Carlsbad, California, which I believe is where I**
11 **located these.**

12 MR. KELLY: Your Honor, I'd move for the
13 admission of 417 through 447.

14 MS. POLK: Objection. Foundation.

15 THE COURT: Sustained.

16 Q. BY MR. KELLY: Detective, let me hand you
17 Exhibit 154. Do you recognize Exhibit 154 as the
18 release and waiver for Jeanne Armstrong located
19 during your search warrant of the Carlsbad,
20 California, JRI office search?

21 A. I do.

22 Q. And was that in proximity to the waivers,
23 which have been admitted on behalf of James Shore,
24 Liz Neuman, and Kirby Brown?

25 A. Yes.

1 MR. KELLY: Your Honor, I'd move for the
2 admission of 154.

3 MS. POLK: May I see 154.

4 Your Honor, may I voir dire the witness?

5 THE COURT: Yes, you may.

6 VOIR DIRE EXAMINATION

7 BY MS. POLK:

8 Q. Detective, do you know who Jeanne
9 Armstrong is?

10 A. **I know she's one of the participants.**

11 Q. And did she, in fact, testify in this
12 trial?

13 A. **She did.**

14 Q. Do you recognize her signature?

15 A. **No.**

16 MS. POLK: Your Honor, objection. Foundation.

17 THE COURT: Mr. Kelly.

18 MR. KELLY: That's fine, I guess, Judge.

19 CROSS-EXAMINATION (Continued)

20 BY MR. KELLY:

21 Q. Detective, during your investigation was
22 it your understanding that each and every
23 participant signed a waiver or release from
24 liability executed on behalf of JRI?

25 A. **Yes. I believe except for the Dream**

1 **Team.**

2 Q. And, of course, that would include James
3 Shore, Kirby Brown, and Liz Neuman; correct?

4 A. **I don't remember if Liz Neuman signed the**
5 **JRI release form. She was a Dream Team member.**

6 Q. But her information is in evidence;
7 correct?

8 A. **What do you mean?**

9 Q. During your direct examination, the State
10 of Arizona provided you similar documents and moved
11 them into evidence.

12 Do you recall that?

13 A. **I do.**

14 Q. Now, before the break we were talking
15 about wood and volatiles. Do you recall that?

16 A. **I do.**

17 Q. And you would agree with me, again, that
18 this exhibit, which has been marked as 345 and
19 conditionally admitted, was signed
20 February 4th, 2010; correct?

21 A. **What exhibit?**

22 Q. 345, which is the crime lab report.

23 A. **Yes.**

24 Q. And that was the day after the grand jury
25 proceeding in this case; correct?

1 A. Correct.

2 Q. So obviously you -- the grand jury didn't
3 know about this information; correct?

4 A. Correct.

5 Q. And you mentioned on direct that there is
6 a December 14th, 2009, presentation to various
7 agencies, including medical examiners; correct?

8 A. Correct.

9 Q. And you attended and made a presentation;
10 correct?

11 A. Yes.

12 Q. And obviously you didn't have this
13 information, so those medical examiners on
14 December 14th, 2009, would not have had that
15 information; correct?

16 A. Correct -- actually, let me -- let me
17 correct that. The medical examiners were in direct
18 contact with the lab prior to that December 14th
19 meeting. So I wouldn't have given them the
20 information. But the lab may have.

21 I don't know if their tests were
22 completed by that meeting, but I know that the --
23 the DPS crime lab was in contact with
24 Dr. Fischione.

25 Q. Of course, you wouldn't know whether or

1 not a medical examiner spoke with the crime lab;
2 correct?

3 A. It's documented in the lab notes.

4 Q. You're talking about the reference to
5 Dr. Fischione; correct?

6 A. Correct.

7 Q. Because I believe the lab test results
8 were actually conducted in January of 2010, which
9 would be about two weeks after your presentation.

10 You -- you want to take a look at
11 Exhibit 584 again to refresh your recollection as
12 to the communications log?

13 A. Sure. The lab notes indicate that --

14 Q. Wait. Wait. It's not in evidence, so
15 you can't -- you can't testify as to its contents.
16 Okay?

17 My question was, did you present this
18 information, which is contained in Exhibit 345, the
19 crime lab report, during your December 14th, 2009,
20 presentation? And you said, no; correct?

21 A. I thought the question was about whether
22 or not the lab had contact with --

23 Q. No. I'm trying to clarify. The first
24 question was, did you present it on December 14th?
25 You said, no; correct?

1 A. Correct.

2 Q. And then you started talking about you
3 don't know whether or not the medical examiners had
4 a communication prior to that date; correct?

5 A. No. I said the -- the medical examiners
6 did have communication with the DPS crime lab prior
7 to that date.

8 Q. And we should ask the medical examiners
9 as to what they relied upon in regards to that
10 communication; correct?

11 A. Correct.

12 Q. Because you didn't know what the results
13 were; correct?

14 A. Correct.

15 Q. And the results are published on
16 February 4th, the day after the grand jury
17 proceeding; correct?

18 A. Correct.

19 Q. Now, going back to October 9th, 2009,
20 when you released the scene back to the Hamiltons,
21 then you return on -- what day was it to Angel
22 Valley?

23 A. Can I look at my notes just to be sure?
24 I think it was the 26th.

25 Q. I think so too.

1 A. Yes. It was the -- I'm sorry.
2 October 26th, 2009.

3 Q. And when you turn -- return on
4 October 26th, 2009, the wood pile that we discussed
5 in Exhibit 512 was gone; correct?

6 A. I don't know.

7 Q. Let's take a look at 512. Do you recall
8 that when you released the scene to the Hamiltons
9 on October 9th, they told you they were going to
10 have a cleansing ceremony?

11 A. Correct.

12 Q. And -- and the next day, October 10th,
13 after listening to the testimony in this case,
14 there was a cleansing ceremony; correct?

15 A. Correct.

16 Q. That's the one where they -- the key
17 portions of the kiva were burned in the pit and the
18 tarps were hauled off; correct?

19 A. Correct.

20 Q. And then the scene was cleaned up;
21 correct?

22 A. I don't know.

23 Q. Well, you went back to collect a soil
24 sample on October 26th; correct?

25 A. No.

1 Q. October 30th; correct?
 2 A. **No. I didn't go back to collect the soil**
 3 **sample.**
 4 Q. Let's take a look at 564.
 5 Do you recognize this photograph?
 6 A. **I've seen this. I have no idea when it**
 7 **was taken.**
 8 Q. Here's my question, Detective: You heard
 9 Mr. Hamilton testify; correct?
 10 A. **I did.**
 11 Q. Did you hear him testify that after you
 12 released the scene they had a cleansing ceremony?
 13 A. **Correct.**
 14 Q. After the cleansing ceremony, he got rid
 15 of all the wood on his property; correct?
 16 MS. POLK: Your Honor, objection. Misstates
 17 the testimony.
 18 THE COURT: I think it does.
 19 Sustained.
 20 MR. KELLY: I'll rephrase.
 21 Q. Do you recall Mr. Hamilton's testimony?
 22 A. **I do.**
 23 Q. Do you recall his testimony as it relates
 24 to the disposal of the wood on his property?
 25 A. **I recall that he had sold wood as**

1 **firewood over a period of time. I don't remember**
 2 **the time frame. But --**
 3 Q. You know that a detective went back on
 4 October 30th, 2009, to take a soil sample; correct?
 5 A. **I know that Josh Nelson went back. And I**
 6 **think -- I think Sergeant Winslow, who was the**
 7 **detective sergeant at that time, went there with**
 8 **him. But I'm not certain about that.**
 9 Q. And the purpose of going back was that
 10 the crime lab had indicated they needed a control
 11 sample. You talked about that on direct; correct?
 12 A. **Correct.**
 13 Q. And when they went back, they took a
 14 picture of the soil sample they had taken and
 15 marked it with an evidence item number; correct?
 16 A. **Correct.**
 17 Q. So let's talk a look, Detective, at
 18 Exhibit 577, which is in evidence.
 19 MS. POLK: Your Honor, I don't believe 577 is
 20 in evidence.
 21 MR. KELLY: I'm sorry.
 22 THE COURT: Yeah. 577 is not.
 23 MR. KELLY: I apologize.
 24 MS. POLK: Your Honor, the state would
 25 stipulate subject to the same condition that

1 photographs that more accurately depict the
 2 original photographs be substituted.
 3 THE COURT: Okay. So that -- 577 is admitted
 4 with that understanding.
 5 (Exhibit 577 admitted.)
 6 MS. POLK: And, Your Honor, subject also to a
 7 foundation as to when these photographs were taken
 8 and who the photograph is.
 9 MR. KELLY: May I approach the witness?
 10 THE COURT: Yes. But when you do, I'm -- I'm
 11 not clear now what -- what exhibits have been
 12 offered. So I'm going to need to start again on
 13 that.
 14 Q. BY MR. KELLY: Let's take a look at
 15 Exhibit 577. Do you recognize that scene?
 16 A. **I do.**
 17 Q. Do you recognize the Yavapai County
 18 Sheriff's Office evidence marker in 577?
 19 A. **I do.**
 20 Q. Do you believe that was taken
 21 October 30th, 2009?
 22 A. **I believe that's when they went back.**
 23 Q. Do you have any reason to dispute that it
 24 was not? You're the case agent.
 25 A. **No. I don't have any reason to dispute.**

1 Q. Take a look at 576. Same question. Do
 2 you see the evidence marker?
 3 A. **I do.**
 4 Q. Any reason to believe that was not taken
 5 on October 30th, 2009?
 6 A. **No.**
 7 Q. Take a look, please, at 579. Same
 8 question. Do you see the evidence marker?
 9 A. **I do.**
 10 Q. Do you believe that photograph could have
 11 been taken on October 30th, 2009?
 12 A. **Yes.**
 13 Q. And 575. Same question, Detective.
 14 A. **Yes to the same questions.**
 15 MR. KELLY: Your Honor, I would move -- I
 16 would move for the admission of 575, 579, 576, and
 17 577.
 18 THE COURT: Ms. Polk.
 19 MS. POLK: Your Honor, no objection subject to
 20 the issue with regard to the quality of the photos.
 21 MR. KELLY: And if we could publish, please,
 22 then, 576.
 23 THE COURT: 575, 576, 577, 579 are admitted
 24 with the understanding there's going to be clearer
 25 photos substituted with the same number.

1 (Exhibits 575, 576, and 579 admitted.)
 2 And that number on the screen, Mr. Kelly,
 3 is what number?
 4 MR. KELLY: Judge, that is 576.
 5 THE COURT: You may continue.
 6 Q. BY MR. KELLY: Detective, do you
 7 recognize Amayra Hamilton in the photograph?
 8 A. **No. But I know that that was Amayra**
 9 **Hamilton.**
 10 Q. Does that help, blowing her up?
 11 A. **Sure.**
 12 Q. Okay. Do you see the evidence marker I
 13 asked you about?
 14 A. **I do.**
 15 Q. And is that associated with the soil
 16 sample that your department went back to collect?
 17 A. **Yes.**
 18 MR. KELLY: And if we can get the broad view.
 19 Q. Do you recall the testimony about the
 20 cleansing ceremony?
 21 A. **Yes.**
 22 Q. The heart-shaped rocks. Do you remember
 23 that testimony?
 24 A. **No. You mean about the -- the rocks that**
 25 **they formed into the shape of a heart?**

1 Q. Yeah.
 2 A. **Yes.**
 3 Q. Do you see the interior circle, heart
 4 shaped?
 5 A. **Yes.**
 6 Q. The exterior circle of the ceremony;
 7 correct?
 8 A. **Correct.**
 9 Q. Now, my question was simply, the wood is
 10 gone; correct?
 11 A. **Correct.**
 12 Q. And it appears that after eight years of
 13 owning Angel Valley, that after you released the
 14 scene on October 9th, between that date and
 15 October 30th, the Hamiltons have cleaned the wood
 16 off of this area; correct?
 17 A. **No. The -- the wood that was -- if I --**
 18 **if I can just draw on here. The wood stack that**
 19 **was here was only placed here just for the sunlight**
 20 **ceremony. That's not --**
 21 Q. That's your belief, isn't it?
 22 A. **That's what --**
 23 MS. POLK: If Mr. Kelly would let him finish
 24 his testimony.
 25 MR. KELLY: I'm just clarifying.

1 THE COURT: Okay. And I -- I don't know that
 2 the detective had completed the -- his answer. But
 3 then again, it was a yes -- yes or no. He was
 4 volunteering. So we'll -- we'll just start again.
 5 Mr. Kelly.
 6 Q. BY MR. KELLY: Take a look at this
 7 Exhibit 576. It's a view of the exact area where
 8 the sweat lodge was when you saw it on October 9th;
 9 correct?
 10 A. **Yes.**
 11 Q. No pile of wood; correct?
 12 A. **No.**
 13 Q. No tree limb pile of wood; correct?
 14 A. **No.**
 15 Q. No lumber wood in a smaller pile;
 16 correct?
 17 A. **Correct.**
 18 Q. No small intentions fire pile of wood;
 19 correct?
 20 A. **Correct.**
 21 Q. And this is 21 days after your release of
 22 the scene; correct?
 23 A. **Correct.**
 24 Q. It's gone forever?
 25 A. **Correct.**

1 Q. If we could just go through this. Again,
 2 these photographs were taken by the Yavapai County
 3 Sheriff's Office; correct?
 4 A. **I believe so.**
 5 Q. So if we can take a look at 579. Do you
 6 see any wood in that picture -- you know -- stacked
 7 wood, intended to be burnt or used for
 8 construction?
 9 A. **No.**
 10 Q. 575. Do you see any wood for perhaps
 11 firewood use or construction use?
 12 A. **No.**
 13 Q. 577. Any wood stacked there for
 14 construction or firewood purposes?
 15 A. **No.**
 16 Q. So again, eight years of owning Angel
 17 Valley, apparently within approximately three weeks
 18 of the date you release the crime scene, Angel
 19 Valley cleans up its property?
 20 A. **That's not accurate.**
 21 Q. Well, Detective, correct me if I'm wrong,
 22 but these are the -- this is the evidence in the
 23 case that your department gathered during your
 24 investigation; correct?
 25 A. **Correct. But I think you're mistaken as**

1 to where the wood piles were. They were on the
2 other side of where this picture was taken.

3 Q. Trust me. I'm not mistaken. I'm limited
4 by the evidence you've collected; correct?

5 A. Correct.

6 Q. We don't have a photograph of the covered
7 wood pile; correct?

8 A. Correct.

9 Q. We have to rely on the testimony some 18
10 months later of Mr. Hamilton, who told us that
11 after this incident he decided to cut that wood up
12 and sell it for firewood; correct?

13 A. Correct.

14 Q. Mr. Hamilton, like we talked about, a
15 person who had been sued; correct?

16 A. Correct.

17 Q. Who was suing someone else; correct?

18 A. Correct.

19 Q. And I believe --

20 MS. POLK: Your Honor, objection to -- I don't
21 believe there was testimony that Mr. Hamilton had
22 been sued in October of 2009.

23 THE COURT: Sustained.

24 Q. BY MR. KELLY: You heard the testimony of
25 Mr. Hamilton; correct?

1 A. Correct.

2 Q. Mr. Hamilton is a guy who -- strike that.
3 Let's take a look at Exhibit 795 now and
4 796, 797, 798, 799, and 800.

5 Let's go back to 799, please. Detective,
6 you were provided these photographs after you met
7 with Michael and Amayra Hamilton on March 21, 2011;
8 correct?

9 A. Correct.

10 Q. I understood your direct testimony to be
11 that you called the Hamiltons to ask them
12 specifically questions about use of rat poison on
13 their property. Correct?

14 A. No. From what I remember is I was asked
15 to call the Hamiltons to ask about if they had any
16 documentation about the D logs, that they had been
17 treated. And the Hamiltons were going to be in
18 Prescott -- I don't remember the date, but -- but
19 they asked if they could meet in person.

20 And it was during that -- that brief
21 meeting -- it wasn't set up to be an interview --
22 during that brief meeting is when we talked about
23 the rat poison.

24 Q. Detective, do you recall during this
25 trial Mr. Li using this chart during his

1 questioning of Amayra Hamilton?

2 A. Yes and no. I wasn't in the courtroom
3 during -- when Mr. Li created this chart. But I
4 came in later and saw the chart as Li continued
5 to -- to question Amayra.

6 Q. So -- it's not in evidence, but if you'd
7 like to refer to it, please do.

8 You would agree with me that, looking at
9 the chart, that this incident happened on
10 October 8th, 2009; correct?

11 A. Correct.

12 Q. That on February 16th, 2011, this trial
13 started; correct?

14 A. Correct.

15 Q. You helped select the jury?

16 A. Yes. You're talking about jury selection
17 or --

18 Q. Yes.

19 A. Okay. Yes.

20 Q. And then on March 1, 2011, Mr. Li made an
21 opening statement; correct?

22 A. Correct.

23 Q. And you heard that opening statement;
24 correct?

25 A. I did.

1 Q. And then on -- on March 21, 2011, after
2 Mr. Li had made his opening statement and after
3 witness testimony was presented in this trial, you
4 contact the Hamiltons about the D logs; correct?

5 A. Correct.

6 Q. That's 17 1/2 months after the incident;
7 correct?

8 A. Correct.

9 Q. That interview -- remember the basic
10 principles of interviewing we talked about?
11 Tape-recorded is the best way?

12 A. Yes.

13 Q. It wasn't tape-recorded; correct?

14 A. No.

15 Q. Remember how we talked about separating
16 witnesses to ensure credibility?

17 A. Can I explain? This was not an
18 interview. I didn't -- I wasn't setting up an
19 interview. I called to ask about documentation
20 about the D logs. And I believe that when I met
21 with the Hamiltons, they were going to give me
22 documentation. I didn't intend to sit down and
23 talk to them, but that ended happening. It was a
24 brief, about a 15-minute, discussion.

25 But that was not an interview. If it

1 **was, it would have been tape-recorded and they**
2 **would have been separated.**

3 **Q.** But you didn't have a tape recorder. I
4 mean, you didn't tape it; correct?

5 **A.** **That's correct.**

6 **Q.** And you had available at your disposal a
7 tape recorder; correct?

8 **A.** **Correct.**

9 **Q.** You were in charge of the interview. You
10 could have said, wait a second. I want to tape
11 this. Correct?

12 **A.** **Correct.**

13 **Q.** You could have said, wait a second. I
14 want to talk to you separately. Correct?

15 **A.** **Correct.**

16 **Q.** But you conducted it in a more informal
17 manner; correct?

18 **A.** **Correct.**

19 **Q.** And this is about what? A month after
20 Mr. Li's opening statement; correct?

21 **A.** **Correct.**

22 **Q.** Before the break -- do you recall that it
23 was during Michael Hamilton's testimony that he
24 said that CCA was banned in 2004?

25 **A.** **I don't recall that. No.**

1 **Q.** And when he showed up in your office
2 on -- on March 21, 2011, you had had the
3 opportunity to sit through the course of this
4 trial -- correct? -- up to that point?

5 **A.** **Correct.**

6 **Q.** And you asked him whether or not he
7 had -- if the logs used to heat the rocks had been
8 treated with any chemicals; correct?

9 **A.** **Correct.**

10 **Q.** And -- and he said no; correct?

11 **A.** **Correct. I think we had discussed -- can**
12 **I -- can I explain?**

13 **I think we had discussed whether or not**
14 **the logs had been treated long before that. The**
15 **question was whether or not he had documentation**
16 **from the manufacturer whether or not the D logs had**
17 **been treated.**

18 **Q.** And, of course, he said no; correct?

19 **A.** **He said that --**

20 **Q.** Do you have a copy of your report in
21 front of you?

22 **A.** **I don't. He said he would get the**
23 **documentation.**

24 **Q.** Do you need a copy of your report?

25 **A.** **Yes.**

1 **MR. KELLY:** May I approach?

2 **THE COURT:** Yes.

3 **Q.** **BY MR. KELLY:** So, Detective, he then
4 tells you that they only treat the logs after the
5 houses are built; correct?

6 **A.** **Correct.**

7 **Q.** You were never present --

8 **MS. POLK:** Your Honor --

9 **Q.** **BY MR. KELLY:** -- when --

10 **MS. POLK:** Excuse me, Mr. Kelly.

11 The witness has given his report. It's
12 not clear for what purpose. If he's being asked to
13 review it, can he review it without a question
14 being posed or can we have a question --

15 **THE COURT:** Mr. Kelly, are you presenting it
16 for review first?

17 **MR. KELLY:** If he needs it.

18 **THE COURT:** Okay. I noticed he was reviewing
19 it.

20 So if you need to do that.

21 **THE WITNESS:** Are you going to ask me
22 questions about what's in the report?

23 **MR. KELLY:** I don't know.

24 **THE COURT:** Detective, you can go ahead and --
25 and look at it.

1 **Q.** **BY MR. KELLY:** Detective, what I'm going
2 to do is substitute what's been marked for purposes
3 of identification only Exhibit 991, which is a copy
4 of your report, and take my copy back.

5 You've had a chance to take a look at it?

6 **A.** **Yes.**

7 **Q.** I don't know if you need to review this
8 because I don't know what your answer is going to
9 be. You understand that?

10 **A.** **Sure.**

11 **Q.** All right. Here's my point is, I take it
12 from your testimony that the Hamiltons come into
13 your office on the 21st, and you ask them whether
14 or not the logs used to heat the rocks had ever
15 been treated with chemicals, and Mr. Hamilton says
16 no. Correct?

17 **A.** **Correct.**

18 **Q.** And then he says, we only treat the logs
19 after the cabins are built; correct? And I'm
20 paraphrasing.

21 **A.** **Correct. I can -- can I add a little bit**
22 **more detail? There were a couple different things**
23 **that we were talking about as far as being treated.**
24 **Some of these D logs are actually dipped in**
25 **pesticides and preservatives and things like that**

1 before -- before they're made into a log cabin.
 2 And other logs are -- are used just raw without any
 3 treatment and made into log cabins and then treated
 4 with a preservative. And so there's -- there is
 5 several different types of treated wood that we're
 6 talking about.

7 Q. I understand. But I -- just listen to my
 8 question. Mr. Hamilton says that he does not treat
 9 the logs used to construct his buildings until
 10 after they're constructed, during this interview;
 11 correct?

12 A. Correct.

13 Q. And my question is, you do not have any
 14 personal knowledge that any of those logs that were
 15 used after the construction and treated were
 16 contained in any of these piles; correct?

17 A. I didn't see any treated logs in the
 18 piles. And if I can explain further. You can look
 19 at the buildings after the wood is treated, and
 20 it's a different color. The stain makes it a
 21 different color.

22 Q. So you could see turpentine that had been
 23 stained on a log? It's colorless; right?

24 A. Correct.

25 Q. And that's -- that's why we have crime

1 labs; correct?

2 A. Correct.

3 Q. Now, I take it from your testimony, then,
 4 as you are arranging this meeting after the
 5 beginning of this trial to talk about treated wood,
 6 then Mr. Hamilton and Mrs. Hamilton volunteer
 7 information about rat poison?

8 A. That's correct.

9 Q. You didn't ask them that question?

10 A. I don't remember if I brought it up or
 11 they brought it up. But then after we started
 12 talking about it, I started asking questions about
 13 it.

14 Q. Take a look at the second page of your
 15 report. Did you get a chance to look at it?

16 A. Yes.

17 Q. Does that refresh your recollection
 18 whether you initiated the conversation about rat
 19 poison or whether Ms. Hamilton initiated it?

20 A. I think Ms. Hamilton initiated it.

21 Q. So after 17 1/2 months after this
 22 accident, for the first time Amayra Hamilton,
 23 without any suggestion on your part, says -- and
 24 I'm paraphrasing -- hey, Detective? By the way, I
 25 want to tell you with the rat poison we use?

1 A. I believe so.

2 Q. That seems a little unusual or
 3 coincidental to me. Does it to you?

4 A. It didn't at the time. And I don't --
 5 and I'm not sure why.

6 Q. Well, we know that on October 8th and
 7 October 9th Mr. Mercer had made reference to the
 8 tarps being stored with rat poison.

9 Do you recall that?

10 A. I do.

11 Q. And then some 18 months later
 12 Ms. Hamilton, after Mr. Li gives his opening, after
 13 witnesses are -- present testimony in this case,
 14 she shows up and volunteers that information. Fair
 15 statement?

16 A. Sure.

17 Q. And in addition to that, I believe -- I
 18 don't want to mischaracterize any evidence. But
 19 the next day she actually emails you some
 20 photographs; correct?

21 A. Correct.

22 Q. And I believe those are the ones that we
 23 had up, such as photograph 798.

24 And I want to ask you the specific
 25 question, ask you to look at your report and think

1 back to this conversation. When Ms. Hamilton
 2 provided this photograph to you or said she was
 3 going to, is it your belief she was trying to
 4 recreate what the pump house looked like in regards
 5 to the rat poison back in October of 2009?

6 A. Yes.

7 Q. It wasn't during the entire year of 2009
 8 that it may have looked like this. It was during
 9 the relevant time period; correct?

10 A. I can't remember if I specified
 11 October 2009 or not, but my intention was to get
 12 pictures of -- of what the pump house would have
 13 looked like in October 2009. But I may have just
 14 said 2009.

15 Q. And then during this meeting on March 21,
 16 Ms. Hamilton tells you that they're going to use
 17 the least toxic rat poison possible. So they did a
 18 little study and decided this Just One Bite was the
 19 best choice? And again I'm paraphrasing.

20 A. That's what they said.

21 Q. And remember talking about police reports
 22 and their accuracy? It's something you do every
 23 day of your professional life; correct?

24 A. Correct.

25 Q. So you try to be as accurate as possible;

1 correct?

2 **A. I write down what happens.**

3 **Q.** And you try to be as accurate as
4 possible.

5 **A. Yes.**

6 **Q.** In terms of what happens; correct?

7 **A. Correct.**

8 **Q.** So Amayra said the rat poison they used
9 was the least toxic they could find; correct?

10 **A. That's correct.**

11 **Q.** And I asked you a question earlier today
12 about including exact words that a person says in
13 quotes. Do you recall that?

14 **A. I do -- I recall that and I do recall her
15 saying, least toxic.**

16 **Q.** Okay. Provided a percentage --

17 THE REPORTER: Excuse me, Mr. Kelly.

18 MR. KELLY: I'm sorry.

19 **Q.** In this police report that's been marked
20 for purposes of identification, you actually
21 include the active ingredient and it's percentage;
22 correct?

23 **A. Correct.**

24 **Q.** And you include the name of the poison in
25 quotation marks, Just One Bite; correct?

1 **A. Correct.**

2 **Q.** And that's consistent with the
3 photographs provided the next day; correct?

4 **A. It's consistent with the package -- the
5 photograph they sent with the package. I don't
6 remember if those were the yellow bricks or not.**

7 **Q.** Well, let's put up Exhibit 800.

8 **A. Yes.**

9 **Q.** So the interview takes place on the 21st.
10 The photographs show up on the 22nd; correct?

11 **A. Correct.**

12 **Q.** Now, you were in this courtroom when Fawn
13 Foster testified; correct?

14 **A. Correct.**

15 **Q.** So look at Mr. Li's chart. That's
16 April 1, 2011. Do you have any reason to dispute
17 that?

18 **A. No.**

19 **Q.** Then after that you receive from the
20 Hamiltons Exhibit 882; correct?

21 **A. No.**

22 **Q.** No?

23 **A. No.**

24 **Q.** You know, strike that. I -- I misstated
25 the sequence.

1 There was an interview that Ms. Do,
2 myself, Mr. Hughes, and were not you present on
3 April 6th, 2011?

4 **A. I don't remember April 6th. But it was
5 around that time. Yes.**

6 **Q.** Okay. So it was right down here at the
7 county attorney's office; correct?

8 **A. Correct.**

9 **Q.** You were there; correct?

10 **A. Correct.**

11 **Q.** You heard Ms. Do interview Mr. and
12 Mrs. Hamilton; correct?

13 **A. Correct.**

14 **Q.** And you know these photographs were
15 produced on that day, April 6th; correct?

16 **A. Correct.**

17 **Q.** Five days after Fawn Foster's testimony;
18 correct?

19 **A. Correct.**

20 **Q.** In fact, Ms. Foster testified on a
21 Friday; correct?

22 **A. I don't remember.**

23 **Q.** Do you remember me cross-examining her?

24 **A. I -- yes.**

25 **Q.** Do you have any reason to dispute it was

1 Friday --

2 **A. No.**

3 **Q.** -- April Fool's Day?

4 **A. No.**

5 **Q.** Now, we show up in an interview. And if
6 you want to take a look at your police report, this
7 photograph would contradict what she had told you
8 during the March 21 interview; correct?

9 MS. POLK: Your Honor, objection.

10 MR. KELLY: You want me to rephrase the
11 question, Judge?

12 THE COURT: You can answer that. If you're
13 able to, you may do so.

14 Overruled.

15 THE WITNESS: Maybe you can direct me to a
16 certain part of the report.

17 **Q.** BY MR. KELLY: Sure. On page -- we
18 talked about just One Bite rat poison; correct?

19 **A. Correct.**

20 **Q.** You see Just One Bite up in
21 Exhibit 800 -- 882? The yellow stuff?

22 **A. Yes.**

23 **Q.** Do you see the green stuff, d-CON?

24 **A. Yes.**

25 **Q.** And Ms. Hamilton on March 21 told you

1 that they only use the rat poison, the least toxic
2 they could find, which was Just One Bite; correct?

3 **A. Correct.**

4 **Q.** Then she provided on April 6 the
5 photographs of the two other types of rat poison
6 they used; correct?

7 **A. Correct.**

8 **Q.** So the question is, is that not
9 inconsistent with what she told you on March 21?

10 **A. It was my understanding that we were**
11 **talking about 2009, what rat poison was used**
12 **in 2009.**

13 **Q.** Detective, during this interview do you
14 remember a discussion from the Hamiltons about a
15 policy of Angel Valley not to use any type of
16 toxins or poisons?

17 **A. Yes.**

18 **Q.** And then they interview on March 21 and
19 say, 18 months after the accident, oh. By the way,
20 we use Just One Bite, but it's the least toxic.
21 Correct?

22 **A. I don't remember them saying that they**
23 **don't use any poisons prior to saying that they**
24 **used the Just One Bite. I remember that was a part**
25 **of the same conversation. They said, we don't use**

1 **any poisons, except we had a rat problem that we**
2 **couldn't get rid so we went ahead and used rat**
3 **poison.**

4 **Q.** Amayra explained that she and Michael
5 don't believe in pesticides --

6 MS. POLK: Your Honor, objection to reading
7 from the exhibit.

8 THE COURT: Overruled.

9 **Q.** BY MR. KELLY: In your police report did
10 you not record as follows: Amayra explained that
11 she and Michael don't believe in pesticides and
12 don't use pesticides except in the pump house
13 because the benefits outweigh the dangers?
14 Correct?

15 **A. That's correct.**

16 **Q.** And then she said -- Amayra said, the rat
17 poison they used was the least toxic they could
18 find; correct?

19 **A. That's correct.**

20 **Q.** Amayra said, the covers never had contact
21 with the poison; correct?

22 **A. Correct.**

23 **Q.** Amayra said, they use the poison called
24 "Just One Bite" with an active ingredient of
25 bromadiolone of .005 percent; correct?

1 **A. Correct.**

2 **Q.** That was on March 21, 2011; correct?

3 **A. Correct.**

4 **Q.** On April 6, 2011, this photograph was
5 provided during that interview; correct?

6 **A. Correct.**

7 **Q.** Showing different types of rat poison;
8 correct?

9 **A. Correct. But if I can explain, this**
10 **conversation was only about the pump house.**

11 **Q.** Did I read this correct?

12 **A. You did. But we were --**

13 **Q.** Did Amayra Hamilton say, they don't
14 believe in pesticides and don't use pesticides
15 except in the pump house?

16 **A. Correct.**

17 **Q.** Did she provide that photograph on
18 April 6th showing additional pesticides?

19 **A. Correct.**

20 **Q.** Remember we talked about --

21 MS. POLK: Your Honor, the state would
22 stipulate to the admission of Detective Diskin's
23 report. I believe it's Exhibit 991.

24 MR. KELLY: Judge, I don't agree.

25 THE COURT: Okay. All right.

1 MS. POLK: Your Honor, Mr. Kelly has been
2 reading into the record from this report excerpts
3 from the report. The state would stipulate to its
4 admission.

5 THE COURT: The stipulation is not accepted.
6 The portions read were relevant.

7 **Q.** BY MR. KELLY: You were asked during
8 direct examination whether you believed these
9 photographs were staged.

10 Do you recall that?

11 **A. No.**

12 **Q.** Do you recall a discussion with Ms. Polk
13 whether these photographs from the Hamiltons were
14 staged?

15 **A. No.**

16 **Q.** Well, they appear staged, don't they?

17 **A. No.**

18 **Q.** No?

19 **A. No.**

20 MS. POLK: Your Honor, that misstates the
21 testimony. The -- the reference to staging was the
22 photograph taken in 2009, not the 2006 photograph.

23 THE COURT: That's -- I believe that's
24 correct.

25 MR. KELLY: Judge, I shouldn't have been so

1 general in my questioning. 798, please.

2 THE COURT: And I'm sorry. I'm talking over.

3 The objection was sustained.

4 Go ahead, Mr. Kelly.

5 Q. BY MR. KELLY: 798. Those are the
6 photographs I'm talking about as having appear to
7 be provided for your benefit in attempting to
8 recreate something 18 months earlier; correct?

9 A. Correct.

10 Q. We talked about during your investigation
11 how you weigh this testimony or statements made by
12 witnesses. Do you recall that earlier today?

13 A. Somewhat.

14 Q. It wasn't that long ago. I went to the
15 back here some 30 feet away and asked you whether
16 that might affect a witness's ability to see or
17 hear what was going on.

18 Do you recall that?

19 A. I think you were talking about perception
20 or proximity or something like that.

21 Q. Yeah. That was perception. That was
22 done; correct? And we talked about motive and
23 bias; correct?

24 A. Correct.

25 Q. And we talked about how much weight would

1 you provide to someone's testimony if they thought
2 that they could communicate with animals.

3 Do you recall that?

4 A. People can believe whatever belief system
5 they want to have, and that doesn't have any
6 bearing on whether or not they're telling the
7 truth. If they believe that they can talk to
8 animals, that doesn't mean that -- that if they
9 witness an event that they're lying. It's two
10 separate things.

11 Q. And do you think that a person is -- who
12 is having been sued in a lawsuit is always telling
13 the truth?

14 A. I have no -- no way to answer that.

15 Q. All right. Do you believe that a person
16 who runs a business, it's the dream of their life
17 and is in bankruptcy, is always telling the truth?

18 A. I can't answer.

19 Q. Do you believe a person who believes they
20 can communicate with animals is always telling the
21 truth?

22 A. I can't answer.

23 Q. So my question, Detective, is don't you
24 take those types of factors into consideration when
25 you evaluate whether or not this is evidence that

1 should be investigated by the Yavapai County
2 Sheriff's Office and provided to this jury in an
3 attempt to help them understand what's going to
4 happen in this case?

5 A. I think I missed your question.

6 Q. In the December 14th, 2009, meeting with
7 the medical examiners, there was no mention of rat
8 poison; correct?

9 A. Correct.

10 MR. KELLY: Judge, this would be a good time
11 to take a break based on our previous discussion.

12 THE COURT: All right.

13 Then, ladies and gentlemen, we will take
14 the weekend recess at this time. Please remember
15 all aspects of the -- all aspects of the
16 admonition. And be in the jury room at 9:15 next
17 Tuesday.

18 Thank you. You will be excused at this
19 point.

20 You are excused also at this time,
21 Detective. You may step down.

22 I'm going to ask that the attorneys --
23 the parties remain for a few moments.

24 Thank you.

25 (Proceedings continued outside presence

1 of jury.)

2 THE COURT: Please be seated.

3 The jury -- the jury has left the
4 courtroom. I thought I would mention a couple of
5 things. One has to do with the objections
6 regarding foundation.

7 I -- I know that Mr. Kelly had stipulated
8 to foundation. But prior to that I had mentioned
9 my policy is if there's a disclosed exhibit, I'm
10 not going to let foundation stand in the way. The
11 person is going to be given an opportunity to
12 provide foundation. And I just want people to know
13 that. I would hope there'd be cooperation. But
14 I'm just mentioning that.

15 So if there are foundation objections,
16 I'd like to see those worked out. If there are
17 not, I'm going to give the party an opportunity to
18 provide it. And I mentioned that with regard to
19 Ms. Polk's exhibits when they were offered. And
20 I'm mentioning it again because Mr. Kelly had
21 offered some, and there were objections regarding
22 foundation. I just wanted to mention that.

23 Counsel, I know Ms. Polk wanted to work
24 on exhibits. Is there anything else?

25 MR. LI: Your Honor, there was one issue

1 relating to the client files of the various
2 decedents. And I have a copy of the Court's prior
3 discussion relating to that -- relating to client
4 files of -- I believe it was Melissa Phillips. I
5 just would provide it to the Court for whatever use
6 it wants to make. This is the official transcript
7 and dealing with the exact same issue. So to the
8 extent that there's an oral ruling in here, I
9 thought the Court might want --

10 THE COURT: And Ms. Polk --

11 Okay. I want to make sure that the state
12 has that.

13 MR. LI: Absolutely.

14 THE COURT: Okay. Thank you, Mr. Li.

15 MR. LI: Sure. And we'll submit on whatever
16 the -- the rulings are.

17 THE COURT: Okay. And the ruling I made today
18 is, essentially, the -- the -- the actual cost -- I
19 need to -- I need to review this. But what I had
20 stated and I -- and I heard a lot of testimony now
21 since March 2nd.

22 Actual cost incurred by one of the
23 alleged victims in seminars would be admissible.

24 And there was a lot of other information
25 in those documents besides that, though. But --

1 and that's what I had ordered today.

2 Mr. Li.

3 MR. LI: I just wanted to provide the
4 transcripts to Your Honor.

5 THE COURT: Okay. And I appreciate that.

6 MR. LI: And just for the record, so we're
7 clear, when you say "seminars," do you mean every
8 seminar she's ever attended, like every dollar
9 amount, or do you mean for the seminar at issue?

10 THE COURT: Well, I'm talking about the ones
11 that were attended.

12 MR. LI: Every single --

13 THE COURT: Yes.

14 MR. LI: -- seminar ever?

15 THE COURT: Yes. That's --

16 MR. LI: We object, but we understand the
17 Court's ruling.

18 THE COURT: Mr. Hughes, did you have something
19 on that point?

20 MR. HUGHES: Not on that point, Your Honor,
21 but on a different point.

22 THE COURT: All right.

23 MR. HUGHES: And specifically, Your Honor,
24 there appears to have been some suggestion this
25 afternoon that the jury should consider the

1 credibility of a witness based on their religious
2 belief that they can talk to animals or not talk to
3 animals.

4 The rules don't permit a jury to make
5 that consideration. I think at some point, and
6 probably some point soon, the jury should be
7 instructed that what a witness believes or doesn't
8 believe as far as their religious beliefs shouldn't
9 be used as a yardstick to measure their
10 credibility.

11 THE COURT: Defense.

12 MR. KELLY: Judge, keep in mind, Mr. Hamilton,
13 Ms. Hamilton, and Ms. Hamilton ensnared Fawn Foster
14 with this ability. I don't think it's a religious
15 practice. I think it's some supernatural ability
16 they must have.

17 Regardless, that's the evidence they
18 brought out. And I do believe that when people
19 make statements like that, you can assess those
20 statements in regards to how you're going -- how
21 much weight you're going to provide to their
22 testimony.

23 Because it's easy to assume that if -- if
24 they're trying to, as a result of their lawsuits,
25 indicate that somehow they have the ability to keep

1 animals off this property by communication, does
2 not need to use herbicides and pesticide, that
3 becomes a relevant fact.

4 And the jury can assign the weight
5 whatever it would like to. I don't believe that's
6 a religious belief. I think that's -- in my
7 opinion, that's just an attempt by the Hamiltons to
8 try to convince somebody that they're not using
9 pesticides and herbicides at Angel Valley.

10 MR. HUGHES: And, Your Honor, the Hamiltons
11 testified that they -- they do use some of the
12 pesticides. And I won't go over their testimony.

13 The implication today was that if someone
14 believes that they can communicate to animals, you
15 should use that in assessing their credibility.
16 That's precisely the sort of situation that
17 Rule 610 prevents.

18 The Hamiltons' testimony is they -- they
19 have a ministry, they believe in this. And -- you
20 know -- to say they can talk to animals, I suppose,
21 is -- is just similar to saying -- you know -- that
22 I can pray to God, for example. Either of those
23 are areas that should not be used in assessing a
24 person's credibility.

25 THE COURT: Do you have any authority?

1 MR. HUGHES: Rule 610.

2 THE COURT: I'm very aware of Rule 610. And
3 you look at a Webster's Dictionary definition of
4 "religion." And if that's the pertinent religion,
5 pretty -- pretty broad.

6 I'll consider that.

7 MR. HUGHES: Thank you, Your Honor.

8 THE COURT: Anything else?

9 MR. LI: No, Your Honor.

10 MR. KELLY: No.

11 THE COURT: Thank you. Have a good weekend.
12 (The proceedings concluded.)
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1 STATE OF ARIZONA }
2 COUNTY OF YAVAPAI } ss: REPORTER'S CERTIFICATE
3

4 I, Mina G. Hunt, do hereby certify that I
5 am a Certified Reporter within the State of Arizona
6 and Certified Shorthand Reporter in California.

7 I further certify that these proceedings
8 were taken in shorthand by me at the time and place
9 herein set forth, and were thereafter reduced to
10 typewritten form, and that the foregoing
11 constitutes a true and correct transcript.

12 I further certify that I am not related
13 to, employed by, nor of counsel for any of the
14 parties or attorneys herein, nor otherwise
15 interested in the result of the within action.

16 In witness whereof, I have affixed my
17 signature this 11th day of May, 2011.
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24 MINA G HUNT, AZ CR No 50619
25 CA CSR No. 8335

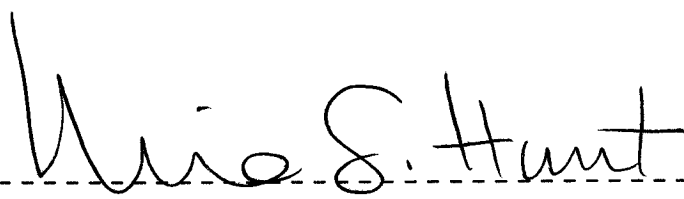
1 STATE OF ARIZONA)
2) ss: REPORTER'S CERTIFICATE
3 COUNTY OF YAVAPAI)
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